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Title	The role of the community service order and the suspended sentence in Ireland: a judicial perspective
Authors	Riordan, David
Publication date	2009
Original Citation	Riordan, D, 2009. The role of the community service order and the suspended sentence in Ireland: a judicial perspective. PhD Thesis, University College Cork.
Type of publication	Doctoral thesis
Link to publisher's version	http://library.ucc.ie/record=b1894321~S0
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Download date	2026-11-03 11:42:03
Item downloaded from	https://hdl.handle.net/10468/734

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THE ROLE OF THE COMMUNITY SERVICE ORDER AND THE SUSPENDED SENTENCE IN IRELAND: A JUDICIAL PERSPECTIVE

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A Thesis Submitted to University College Cork in fulfilment of the Requirement for the Degree of Ph.D.

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Department of Law
University College Cork
2009

DECLARATION

The contents of this thesis are entirely my own work and have not been submitted for any purpose to any other University

In Memory

of

Sean O'Leary

Acknowledgements

I wish to acknowledge the financial assistance provided by the Judicial Studies Institute which allowed me to pursue this study at University College, Cork.

A special word of thanks to my fellow Judges who participated in the focus group discussions and who made themselves available for interview despite pressures of work and time.

To the staff of the Courts Service in the Circuit Criminal Courts in Dublin and Cork, particularly Ms. Mary Crowley, Ms. Jeanette Troy and Ms. Bernie Claffey, a special thank you for allowing access to the case books and "hidden data" on the use of the suspended sentence.

To Mr Liam Convey, Registrar of the Central Criminal Court, for extracting data on the suspended sentence not otherwise available.

To the staff in the Judges' Library, Four Courts, Dublin for their invaluable assistance.

To Ms. Miriam Stack, Ms. Margaret O'Halloran and Ms. Helen O'Sullivan for their help in typing the thesis.

To my supervisors, Professor Caroline Fennell and particularly to Dr. Shane Kilcommins I owe a special debt of gratitude for direction and suggestions.

Finally, to my wife Patricia for patience and forbearance during this long academic captivity, a sincere thank you.

Abstract

Imprisonment is the most severe penalty utilised by the criminal courts in Ireland. In recent decades the prison population has grown significantly despite expressions both official and public to reduce the use of the sanction. Two other sanctions are available to the Irish sentencer which may be used as a direct and comparable sentence in lieu of a term of imprisonment namely, the community service order and the suspended sentence. The community service order remains under-utilised as an alternative to the custodial sentence. The suspended sentence is used quite liberally but its function may be more closely related to the aim of deterrence rather than avoiding the use of the custodial sentence. Thus the aim of decarceration may not be optimal in practice when either sanction is utilised. The decarcerative effect of either sanction is largely dependent upon the specific purpose which judges invest in the sanction. Judges may also be inhibited in the use of either sanction if they lack confidence that the sentence will be appropriately monitored and executed. The purpose of this thesis is to examine the role of the community service order and the suspended sentence in Irish sentencing practice. Although community service and the suspended sentence present primarily as alternatives to the custodial sentence, the manner in which the judges utilise or fail to utilise the sanctions may differ significantly from this primary manifestation. Therefore the study proceeds to examine the judges` cognitions and expectations of both sanctions to explore their underlying purposes and to reveal the manner in which the judges use the sanctions in practice

To access this previously undisclosed information a number of methodologies were deployed. An extensive literature review was conducted to delineate the purpose and functionality of both sanctions. Quantitative data was gathered by way of sampling for the suspended sentence and the part-suspended sentence where deficiencies were apparent to show the actual frequency in use of that sanction. Qualitative methodologies were used by way of focus groups and semi-structured interviews of judges at all jurisdictional levels to elucidate the purposes of both sanctions. These methods allowed a deeper investigation of the factors which may promote or inhibit such usage.

The relative under-utilisation of the community service order as an alternative to the custodial sentence may in part be explained by a reluctance by some judges to equate it with a real custodial sentence. For most judges who use the sanction, particularly at summary level, community service serves a decarcerative function. The suspended sentence continues to be used extensively. It operates partly as a decarcerative penalty but the purpose of deterrence may in practice overtake its theoretical purpose namely the avoidance of custody. Despite ongoing criticism of executive agencies such as the Probation Service and the Prosecution in the supervision of such penalties both sanctions continue to be used. Engagement between the Criminal Justice actors may facilitate better outcomes in the use of either sanction. The purposes for which both sanctions are deployed find their meaning essentially in the practices of the judges themselves as opposed to any statutory or theoretical claims upon their use or purpose.

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INTRODUCTION

The study sets out to explore the role of the community service order and the suspended sentence in Irish sentencing practice in light of judicial cognitions and expectations of these sanctions. The range of sentencing options which are available to the sentencing judge in Ireland are easily identified. These vary from the most severe penalty of imprisonment to the suspension of imprisonment, community service, fines, probation, compensation orders, conditional and unconditional discharges.[1] The frequency with which Irish sentencers utilise those sanctions may in part be gleaned from a number of sources such as the annual reports of the Courts Service, the Probation Service and the Prison Service. However, a complete collation of data for the disposal of criminal cases has proved to be elusive. The most severe penalty in Irish sentencing namely the custodial sentence is used extensively by all of the courts at different jurisdictional levels. It is argued by some writers that imprisonment is over utilised by the criminal courts in Ireland (O'Mahony 1996, McCullagh 1996). Imprisonment, it is argued, should be used only as a penalty of last rather than first resort (Whitaker 1985). Theoretically, both sanctions of community service and the suspended sentences are closely allied to the custodial sentence to such an extent that if such sanctions were not available as alternatives, the sentence would perforce be a term of imprisonment. But the suspicion remains that Irish sentencers in practice may not fully subscribe to this decarcerative perspective. Instead, the courts may tend to develop sentencing practices which answer the particular circumstances of the case before the court without reference to the wider policy implications which underpin either the community service order or the suspended sentence.

The research question emerges from a consideration of the operation of both sanctions in practice. For example, the community service order in Ireland may only be made in direct substitution for a custodial sentence. However it is possible that the sanction may in fact be used as a lesser sanction without any real reference to a custodial requirement (Walsh & Sexton 1999). Moreover, the sanction was introduced to divert offenders away from the prison system but the process of selection of offenders for community service may not fit with this policy in practice. Instead offenders who would otherwise receive a non-custodial sentence may receive a community service order simply because the sanction is now available as a sentencing tool. Similarly, the suspended sentence in Ireland which evolved

[1] A greater range of sentencing options is available when the court is dealing with offenders under 18 years under the Children Act 2001.

from an assumed jurisdiction of the sentencing courts may not comport with the classical manifestation of the sanction as it emerged in other jurisdictions. Does the mere presence of such a sentencing tool promote the liberal use of the suspended sentence? Do sentencing courts always intend to apply a custodial sentence before suspending it or are such courts merely utilising the coercive features of the sanction without ever intending to send the convicted offender into custody?

Regrettably, very little is known about the use of these two sanctions in Irish sentencing practice. A substantial body of literature exists on the law relating to the community service order and the suspended sentence in Ireland but the operation of these sanctions as decarcerative instruments remains obscure. It may be that a substantial number of offenders are diverted from custodial sentences by the use of these sanctions by the courts. If this be so, then the sanctions may be deemed to serve the purpose for which they were designed. But if the sanctions are deployed as a *via media* by the courts as alternatives to other alternatives such as fines, probation and conditional discharges, significant displacement of penalties may be seen to emerge. Simultaneously, the offender who is given a community service order or a suspended sentence without reference to a custodial sentence may be placed in a higher category of risk of receiving a custodial sentence in the event of breach of either sanction.

This thesis proceeds to examine the emergence of these two sanctions to discern their rationales and to set out the contexts from which they emerged. However, an exhaustive study of the literature, legislation, case law and political debates on the sanctions may only advance the enquiry to a certain point. Any further understanding of the issues may only emerge when the cognitions and expectations of the primary actors in the sentencing function namely the judges, are taken into account. Do the judges maintain complete fidelity to the decarcerative policy of the community service order and the suspended sentence? If so, might one conclude that their appetite for the custodial sentence is indeed great when the numbers of community service orders and suspended sentences are added to the sum of custodial sentences? Alternatively, are the judges or some of the judges engaging in organic practices and experimentation when they utilise these sanctions in some different manner and for a different purpose? If this is so, what do the judges believe is the function of either sanction? What do the judges believe they are doing and what do they expect to achieve by structuring the sentences as non-custodial sentences?

To the lay person perhaps best exemplified as a contributor to radio talk programmes, the criminal justice system and particularly the issue of sentencing presents as an inexplicable contingency which should otherwise be transparent and predictable. The inner workings of the criminal justice system at the sentencing level are perceived to be known only to a very select group of experts and professionals. Undoubtedly, legal professionals, both lawyers and judges, who work in the criminal courts daily have acquired a working expertise in the area of sentencing. This knowledge and expertise is empirically based upon years of experience in the courts and by study of the law. Occasionally one hears of cases which come before the courts where a sentence which is handed down is expressed by the public to be inappropriate in the circumstances, usually on the grounds of alleged leniency. This conflict of views on sentencing between the "experts" and the public cannot be resolved in a vacuum of information on how sentencing operates in Ireland. It is argued in this study that neither the public nor indeed the professionals in the sentencing field are fully capable of achieving an adequate overview of the sentencing function. To achieve such insight it is necessary to lift the veil and to enter into a systematic examination of the sentencing function. The public is not equipped to commence such an examination and the professionals are otherwise engaged in the quotidian concerns of dealing with the case at hand without reflecting upon general trends in sentencing or in engaging upon a critique of individual sanctions. Consequently, the task of enquiring into the function of sentencing in Ireland is left to a small coterie of policy researchers, policy makers and academics. Regrettably, Ireland has come late to the study of sentencing when compared with other jurisdictions and such studies which have been conducted to date do not form part of a systematic enquiry to establish a clear corpus of knowledge about sentencing in this jurisdiction. Instead such knowledge of sentencing in Ireland is revealed in a mosaic like fashion where large gaps in our knowledge of sentencing and sanctions persist.

Information on the use of certain sanctions in Ireland is revealed, but only partially so, due to the disjointed statistical gathering methods in the annual reports of the Court Service, the Annual Report on Prison and Places of Detention, Annual Reports of the Prison Service, Annual Report of An Garda Siochana and Statistical Abstracts from the Central Statistics Office. It is not possible to track an individual case from the first moment an offender enters the Criminal Justice system by way of arrest by An Garda Siochana through the courts and perhaps on through the prison system or alternatively the

Probation Service. Instead each agency reports upon its data as if these were represented in separate silos of information. Some studies of a quantitative nature have been conducted to measure the use of specific sanctions such as community service and the suspended sentence (Walsh and Sexton 1999, Needham 1983, Whitaker 1985, Rottman and Tormey 1985). A qualitative study of sentencing practices in Ireland was conducted by Vaughan (2001) (Bacik 2002:359) which concluded that judges did not necessarily believe in the rehabilitative capacity of the prison sentence but they invested the sanction with a wider function of deterrence and public protection. Separately, Bacik *et al* (1998) have examined the link between economic deprivation and crime in the Dublin Metropolitan Area. They found that offenders before the District Court in Dublin are predominantly young, male and from areas of high economic deprivation and that custodial sentences were imposed for 29% of those convicted from the most deprived areas compared with 19% for those convicted from the least deprived area. Thus clear evidence of a variation in the use of the custodial sentence was presented in this study. O'Malley surveyed sentences of rape cases for the year 1992/1994. He found that a bench mark or average sentence for rape could be found in a sentence ranging from 7 to 10 years imprisonment (O'Malley 1996).

The present study is intended to add more coherence to the field of information on sentencing in Ireland. It is not intended to present a completed mosaic at its conclusion but rather will continue, in the present Irish tradition in the study of sentencing matters, to consider further an area which has not received specific attention to date. The deployment of sentences which specifically seek to displace the custodial sentence are central to the enquiry. Such answers which will emerge from the study may affect the approach which future policy makers may adopt in relation to the use of the sanctions. Moreover, by providing information to judges on the operation of these sanctions, which is not ready to hand in daily practice, a certain consistency of approach (O'Malley 2003) may emerge.

To date, the number of qualitative studies on sentencing practice in Ireland is miniscule (Bacik 2002). This study attempts to address an important area in this "absentee discipline" (Kilcommins et al 2004: vii) by identifying the two sanctions which are directly related to the custodial sentence but which when imposed do not require the convicted offender actually to enter into custody. Instead, compliance with a suspended sentence or performance of a community service order within the prescribed time limits provided,

allows the sanction to take full effect while the offender remains at liberty within the community. Moreover, both sanctions if applied as alternatives to custodial sentences, promote the avoidance of custodial sentences and reduce the intake of offenders into the prison.

The writer has previously completed a limited study on the disposal of drug related cases in the District Court, by utilising both qualitative and quantitative techniques (Riordan 2000). In this study, it is intended to broaden the scope of the enquiry where judges dispose of cases under suspended sentences or community service, without specific reference to the limiting feature of drug related offending. However, a constant feature of this and the previous study is the identification of the centrality of the judges' perceptions and expectations of the sanctions utilised. The study is facilitated by research by Halton (1992, 2006) in which the cognitions and expectations of probation officers in Ireland were examined. This latter study located the probation function firmly within the welfarist paradigm which serves as an important insight to this researcher in embarking on an examination of judges' perceptions. As will be revealed presently in this study and as previously noted by the writer (Riordan 2000), common understandings by the various actors in the criminal justice field are difficult to achieve. Frequently, the criminal justice actors – the gardai, the prosecutors, the lawyers, the judges and the probation service – may not share common perceptions and expectations when a sanction is applied by a court. Moreover some of these actors may have an ongoing contribution to make in the monitoring of a community service order or a suspended sentence until such sentence is complete. Conflicts may emerge where competing paradigms dictate different approaches.[2] The criminal justice system is essentially a blaming institution (Boldt 1998) which seeks to identify, apprehend, adjudicate upon and punish the miscreant. The criminal trial which results in a sentence has two distinct phases. These are the trial of guilt which is overwhelmingly a blaming exercise and the sentencing trial upon conviction. The sentencing trial upon conviction is not permeated by the same degree of blaming, although it may be seen to morph into considerations of desert and punishment. In Irish sentencing law, the nature of the offence and the circumstances of the offender must be taken into consideration when deciding upon sentence. Moreover, a clear jurisprudence has been established to promote the ideal of rehabilitation of the offender where possible. All of

[2] For example, a Probation Officer may not wish to breach an offender for failure to comply with a community service order or a suspended sentence in the hope that compliance may still be achievable whereas the courts may wish to take a more strict view in relation to any breach..

these considerations are subject to the principle of proportionality when finally the court decides the sentence to be imposed. If judges utilise the community service order and the suspended sentence as a genuine decarcerative measure, the ideal of rehabilitation may be seen to take prominence in the disposal. However, if the penalties are utilised as stand alone measures, they acquire a more punitive persona. When the suspended sentence or the community service order is made, those given responsibility to supervise the order, usually the probation service, may not necessarily know from which of these perspectives the sentencing court made the original sentence. Consequently, the welfarist paradigm of the Probation Service may be in conflict with the Justice paradigm of the sentencing courts. This constant tension will be examined in this study by reference to the judges' perceptions of the issues of ownership of the sanctions. Is it possible that a court may punish and help the offender at the same time or is it the case as Allen (1981) claims that all rehabilitative approaches degenerate into punitive approaches when applied in a criminal justice context?

The study is also facilitated by the comprehensive study on community service orders by Walsh & Sexton (1999). In particular, the statistical information on the use of the community service order is clearly established having regard to the large sample used in that study. However, this present study takes as a point of departure the question of why and how judges utilise the sanctions in the manner in which they do and what they expect to achieve by doing so. By clarifying the issues on whether judges utilise the two sanctions as stand alone penalties or as alternatives to custodial penalties, it may be possible to gain greater understanding of the general approach which judges in Ireland take when they approach the function of sentencing.

Insider Perspective :The Researcher

The writer has been a judge of the District Court for 14 years and deals with criminal cases on a daily basis. It is observed that the criminal justice system would grind to a halt if the very high degree of guilty pleas was to decrease, such is the volume of cases disposed of daily by all of the criminal courts in Ireland. Consequently, the function most performed by judges exercising criminal jurisdiction in Ireland is that of sentencing itself. To date, no specific piece of legislation has been enacted to define and prescribe the sentencing

function and sentencing guidelines have not found great favour among the judiciary. As a result, the function of sentencing in Ireland proceeds as a type of common law of sentencing (O'Malley 2006) where judges apply sanctions on a case by case basis where the sentence is individualised to best suit the offender's circumstances and the offence in question.[3] As noted previously, the writer has maintained an interest in the wider issues involved in the function of sentencing through a study of disposals of drug related cases. In the present study the writer embarks upon a type of action research (Bell 1993:6) where he examines an issue in which he himself is integrally involved. The methodologies deployed, which will be discussed presently, seek to access the views of fellow judges involved in the function of sentencing. Previously, writers such as Osborough (1982) and Walsh and Sexton (1999) have speculated upon certain judicial sentencing practices in the use of the suspended sentence and community service order respectively. The opportunity to address specifically such practices and the factors which most influence these is presented in this study. The study provides a new perspective and analysis on the function of sentencing in Ireland, particularly in respect of alternatives to custodial sentences. Any targeted approach to the use of alternatives to custodial sentences must be informed by research and supported by dedicated resources. Moreover, any insights which may emerge may provide the various actors and policy makers within the criminal justice system with new directions and challenges. At a personal level also, the writer may gain insight into the phenomenologically based question "What I am doing when I do that?" where a criminal justice actor may reflect upon his/her own sentencing cognitions and practices.

Any claims to dispassionate observation and objectivity in the manner of a classical ethnographic study are abandoned here in favour of the more prosaic but grounded observations of the community service order and the suspended sentence through the eyes of the judges interviewed in the study. Clearly there are distinct dangers when a participant engages in the study of a function where he is also involved. The possibility of slanting a question to suit an answer or overfamiliarity with the respondents may lay the researcher open to the claim of lack of objectivity. But equally there are distinct strengths to such an approach. It is highly improbable that such rich and abundant data which emerged from the focus groups and semi structured interviews in this study would have been accessed by a non-judge/researcher. The judges were robust in their replies when questioned and were

3 More recently a body of literature has emerged through such works as "Sentencing Law and Practice" (O'Malley 2002, 2006).

not slow to inform the "naïve" interviewer accordingly, thus giving the data a certain integrity.

Focus of the Study

The study proceeds to examine the role of the suspended sentence and the community service order in Irish sentencing practice. Essentially the study is an examination of the process of sentencing when these two sanctions are applied, with a view to understanding why the sanctions may operate as they do. The study makes no claim to an examination of efficacy of outcome when either sanction is applied. Although the study may highlight similar sanctions in other jurisdictions and how these may operate under different conditions, it is not intended that this would be considered a comparative analysis of similar sanctions across different jurisdictions. Instead, the inclusion of such references in other jurisdictions is deployed as a heuristic device to understand better the geneses and individualistic features of the two Irish sanctions and what role these may play in the overall function of sentencing. Although the community service order and the suspended sentence are presented as direct alternatives to a custodial sentence, the study proceeds on the hypothesis that some judges may use the sanction of community service order in a somewhat different manner as a punishment. Similarly, it is hypothesised that some judges may utilise the suspended sentence essentially as an instrument of deterrence without any real intention or likelihood that a custodial sentence would have emerged initially in the process.

Some Considerations of Method

The selection of methodologies for any study is to a large extent dictated by the enquiry itself. Moreover, the boundaries of the study and the selectivity of the issues further promote the emergence of particular methodological approaches. A mere counting of how many community service orders and suspended sentences which were imposed at each court level over a defined period of time may give an initial snapshot of the use of the two sanctions and, as already noted, these data are not readily available, particularly in relation to the part suspended sentence and the suspended sentence at District Court level. These

latter data were generated by the writer from analysis of the custodial sentences in the Circuit and Central Criminal Courts and from preliminary data which remain unpublished in respect of the District Court. But the provision of these data when combined with other quantitative data sets already published could not answer questions relating to how and why judges make community service orders and suspended sentences. More importantly they do not advance the enquiry any further to answer the vital "why" questions which form the basis of qualitative analysis. Consequently, it was necessary to combine quantitative techniques to generate data where necessary, with qualitative techniques such as focus groups and semi-structured interviews.

In all, four focus groups of judges were convened. These comprised three focus groups at District Court level and one focus group at Circuit Criminal Court level. Additionally, six semi-structured interviews were conducted using the same questions from the focus groups to allow for consistency of approach. The semi-structured interviews were conducted at District Court, Circuit Criminal Court, Central Criminal Court and Supreme Court level (Court of Criminal Appeal). In total about 23% of the Irish judiciary were either individually interviewed or participated in focus groups on the topics for discussion.[4] The interviews and focus groups were conducted in the summer and autumn of 2007. In the text which follows, judges from the different jurisdictions are identified by reference to the letters SC (Supreme Court), HC (Central Criminal Court), CC (Circuit Criminal Court) and DC (District Court). Otherwise the identification of the judges is not provided for reasons of confidentiality. (See Appendix B for more detail). Besides the Central Criminal Court and Supreme Court, the judges in all Circuit Criminal Courts and District Courts were evenly recruited from both urban and rural areas. The number of judges at District Court and Circuit Criminal Court levels who deal with sentences are of course far greater than the number of judges at the higher jurisdictional levels. Consequently, the numbers of respondents are more accurately weighted at the lower jurisdictional levels.

Access to the judges for interview was facilitated by each of the Presidents of the High Court, the Circuit Court and the District Court. Moreover the study was conducted under the auspices of the Judicial Studies Institute which provided funding for the researcher for

[4] Six individual semi structured interviews were conducted. These comprised interviews with two District Court judges, two Circuit Criminal Court judges, one judge of the Central Criminal Court and one judge of the Supreme Court (Court of Criminal Appeal). Four focus groups were conducted. These comprised three focus groups of District Court judges in groups of five, six and seven and one focus group of the judges of the Circuit Criminal Court comprising three judges of that Court.

the PhD programme. Notwithstanding the "internal" nature of the enquiry where a sentencing judge went about interviewing his fellow judges on the topic, the requirements of confidentiality and anonymity were applied with the same degree of care as if the study was conducted by an external researcher. The writer gave undertakings to his colleagues to preserve the anonymity of each respondent and to destroy the tapes of the interviews and transcripts at the conclusion of the research. The writer observes that the guarantees offered by him combined with his familiarity with the respondents allowed for the emergence of frank observations by the respondents on the operation of the sanctions which might not otherwise have emerged.

Despite the active moderating role adopted by the writer in the focus groups, the sometimes strident disagreement between the participants gave reassurance that the elevated likelihood of bias in the study (Morgan 1988) was significantly curtailed.

The entire group of respondents, whether individually interviewed or collectively in focus groups, comprised an elite group with significant empowerment. While access to this group did not present a difficulty for this researcher, it is acknowledged that this may not be so for others. The designation of the respondents as a "power elite" becomes important in the analysis stage of the study where their responses are deconstructed. In particular the responses may disclose a perceived challenge to the limits or curtailment of their powers which they may be reluctant to relinquish. In the event this was detected and is reported upon.

By combining focus groups and semi-structured interviews with the quantitative data sets as methods of enquiry, this allowed for a degree of triangulation to facilitate the emergence of understandings which can be usefully analysed for internal consistency or inconsistency. Morgan has argued that in the spectrum of naturalistic enquiry the focus group is located between the participant observation and the individual interview (Morgan 1988:23). In commenting on its unique characteristics he states:

> "Substantively, the strength of focus groups comes from the opportunity to collect data from group interaction. The point is not, of course, to tape-record just any interaction but interaction that concentrates on topics of interest to the researcher. When all goes well, focusing the group discussion on a single topic brings forth

> material which would not come out in either the participants own casual conversations or in response to the researchers preconceived questions." (Morgan 1988:23)

Although the semi-structured interview was also used in this study, the format of topics and questions was identical between the focus group and the semi-structured interviews. This allowed for the emergence of consistent replies from respondents where the limitations of the individual interview were tested against the general sentiment of each focus group. Morgan's advice on the appropriateness of using the focus group as a qualitative technique is "... to ask how actively and easily participants would discuss the topic of interest" (Morgan 1988:23). The participants in the focus groups and in the individual interviews very quickly warmed to the topic under discussion thus giving reassurance to the researcher as to the appropriateness of the methodologies selected.

The semi-structured interviews were used for two reasons. Firstly, it was not possible to assemble all respondents into focus groups having regard to the demands on the respondents' time and the fact that they were located in different places in the State. However, individual respondents who were selected for semi-structured interviews were deemed by the writer to have particular knowledge of the sanctions under discussion having regard to their experience within in their respective courts and from their time in practice as solicitors or at the Bar. Secondly, the use of an additional method of data collection gives the qualitative data a certain resonance. Clearly there are limitations attached to both data gathering techniques. In focus groups, it is not unknown for respondents to seek to bring forward a consensus view in relation to the topic under discussion. The writer as moderator warned the respondents at the beginning that such an outcome was not desirable unless the respondents genuinely held to such similar views. This warning seemed to have the effect of alerting the respondents to give their own views no matter how trenchantly they disagreed with others in the focus groups. The respondents in all focus groups behaved with the same degree of naturalness and spontaneity that the writer had experienced when similar discussions had taken place in the past and in which he had participated but without the artificiality of the occasion where every word was audio recorded. This lends credence to the claim that the judges spoke without restraint and indeed with some degree of passion on the sanctions in the focus groups and interviews.

One of the constant criticisms of the semi-structured interview is that respondents may feel obliged to answer questions in a way that will please the interviewer thereby hiding from view answers which approximate more closely to the actual views held by the speaker. Indeed this criticism may also be levelled, but with less force, against the focus group technique. How is the researcher to know if the views expressed in the semi-structured interviews approximate to the cognitions of the judge who is presented with a "live" case for sentencing? This highlights one of the central problems of qualitative analysis but the exclusion of such data on the grounds of such objections would be counterproductive the writer contends. The writer is in a position to observe his colleagues' sentencing practices for a number of years from conversations with them, and from accounts of trials through cases and newspaper reports. As an exercise, the writer anticipated the responses from certain of the judges and when the interviews were typed up, these were examined for consistency. Invariably, the responses conformed to the views previously predicted in relation to the questions. This exercise gives reassurances that the responses were genuinely held by the speakers and conform with the cognitions which underpin their practices.

But the problems of qualitative methodology do not end when the speakers' words are captured on audio tape. The task of accurately recording the speakers' words must next be reduced into typed up scripts which were then compared to the spoken words used on the tapes. Then and only then can the task of analysis begin. The natural event of sentencing must be seen to be at a remove from the script now to be analysed. The script represents an accurate transcription of the sentencers' spoken words or his/her cognitions and expectations. This is mediated through language and is in turn subject to interpretation by the researcher. Multiple copies of the scripts were made and the topics and questions were placed into certain categories for comparison and analysis by the use of different colour markings. The writer was also alert to the possibility of issues emerging in the scripts which were not anticipated by him in the questions presented. When this occurs in qualitative analysis the research is given a bonus, provided the topic is relevant. Usually such issues emerge as a crosscutting topic which may touch upon a number of connected issues for discussion (Kreuger 1998). As expected some of these issues did emerge which allowed the application of an inductive approach to the data collected. When combined with the deductive approach to the hypotheses this gave fuller meaning to the issues under discussion

The topics for discussion in the focus groups and the questions in the semi-structured interviews were previously identified from the literature, case law, legislation and reports on the two sanctions and as discussed in the various chapters hereafter. Moreover, the topics were further particularised into question formats for the focus groups and the semi-structured interviews. The writer sought to cast the questions as open-ended questions which would elicit discussion and elucidation from the interviewee/respondent. Where necessary supplementary questions were formulated to clarify certain replies (see Appendix A for questions for focus groups and semi-structured interviews).

Quantitative Issues

Empirical work on the use of the suspended sentence is quite limited to a snapshot of the practices in the Galway District Court in 1983 (Needham 1983). Statistical data have improved since 1983 on the use of the suspended sentence but a clear *lacuna* presented to the writer when the part suspended sentence was examined in addition to the suspended sentence in the District Court. As a result, it is not possible to identify the part suspended sentence in the annual reports of the Courts Service. Part suspended sentences are counted as one with custodial sentences for all courts. They are not counted separately or reported upon. The writer acquired the raw data from which these raw results were published and by use of sampling was able to extract the use of the part suspended sentence in the Circuit Criminal Court in Dublin and Cork and for the District Court generally. Moreover a full examination of all cases disposed of in the Central Criminal Court gave a clear picture of the use of the part suspended sentence in that jurisdiction.

In general, data sets were taken from the annual reports of the Courts Service, the Prison Service and the Probation Service. Additionally, raw data sets in the possession of the Courts Service were accessed by the writer to allow for discovery of the use of the part suspended sentence which significantly is not reported in the annual reports. This hidden but important disposition was identified as an exclusive device developed and utilised by courts exercising indictable jurisdiction only. The part suspended sentence is an adjunct of the custodial sentence and is not separately counted or reported from the custodial sentence. Casebooks were examined for outcome in the Cork Circuit Criminal Court for

the year 2006 for a whole year survey and a quarter or 1 in 4 sample was taken from the Dublin Circuit Criminal Court records as these were much more extensive. This allowed a clear picture to emerge of the use of the part suspended sentence for these two combined Circuit Criminal Courts.[5] It is argued that such a whole and partial sample allows for the generalisability as a use of the part suspended sentence across the entire Circuit Criminal Court jurisdiction. The use of the part suspended sentence in the Central Criminal Court was ascertained by examining the entire case load of the court for the year 2006 to discern how the court combined custodial sentences with part suspended sentences.[6] The frequency of use of the wholly suspended sentence in the District Court was not capable of calculation until the writer examined raw data sets in the Circuit and District Court Directorate of the Courts Service.[7] This allowed the writer to place the suspended sentence in the District Court in context having regard to the use of other sanctions such as custodial sentences, community service orders, fines and probation.

PRESENTATION

This thesis is presented in seven chapters with a separate conclusion. Both sanctions are separately considered to allow a clear outline for each sanction to emerge. Occasionally reference may be made to the other sanction, especially where respondents link or compare them in their replies.

In Chapter 1 the community service order is introduced as a new sanction which is made available to sentencers for the first time. The factors and influences which led to the introduction of the sanction in England and Wales are examined in detail. [8] The community service idea is traced through the deliberations of the Wooton Committee which identified reparation and rehabilitation of offenders as preferable objectives in sentencing. The growth in prison numbers is presented as the primary impetus for the consideration of new sanctions which might divert offenders from the prison system. A certain rebalancing of sentencing priorities is suggested where the community itself is posited both as a place for punishment and a recipient of reparation. The sentencing

5 These courts represent 5 city courts, 2 in Cork and 3 in Dublin. Moreover they represent the busiest circuit criminal courts in the country and were an obvious choice for the samples and survey taken.

6 The raw data was made available to the writer via the registrar of the Central Criminal Court Mr. Liam Convey (28 Dec. 2007).

7 These data are not published separately from data on custodial sentences.

8 The jurisdiction where formal community service was initially introduced.

objectives which were claimed for community service are examined with particular reference to punishment, rehabilitation, reparation and reintegration of the offender. These rationales may be seen to conflict or compete with one another, which points to the conclusion that community service may serve many purposes at once, depending on who is making such a claim.

In Chapter 2 the idea of community service in practice is explored. How is the sanction to be used and who would supervise its operation? Quite early in the debate in England and Wales the Probation Service was identified as the agency most suited to select offenders for community service and to supervise its operation. Thus community service was markedly different from the traditional probation order. This presents a challenge to the professional orientation of the probation officer and as will be seen certain stresses and strains on the probation officers' function and outlook were to emerge. Was the probationer officer to apply traditional 'probationizing' discretion or was the probation officer to apply strict "justice" criteria when dealing with an offender performing community service? Would the Probation Service adapt to a national standard and if so what would this mean for professional standards? Various studies are presented which show how community service may be optimally applied and which factors in a community service scheme may mitigate against its success. A central issue in this chapter is the claim that community service is meant to act as a decarcerative procedure. The various studies are referenced to discern if sentencers utilise the sanction in this way. Moreover, where divergence from this policy is identified, an attempt is made to explain what is otherwise occurring in the sentencing domain such as displacement of other non custodial sanctions. Where the sanction is used either as an alternative to a custodial sentence or otherwise, the efficacy of the sanction when measured for recidivism is also discussed. The chapter concludes with a discussion on the community service order as a "normalized" sanction among others. Where the sanction is misapplied, is it possible to change the practices of the judges and the probation service to bring about optimal results? These issues are discussed before the chapter concludes.

In Chapter 3 the community service order is seen to arrive finally in Ireland having operated in England and Wales for the preceding decade. The practice of taking legislation "off the shelf" and using it in another jurisdiction is discussed with particular reference to the dangers of unintended consequences for the recipient jurisdiction. Not surprisingly,

the exigencies which presented before the introduction of community service in England and Wales were equally pressing in the Irish jurisdiction. These included acute prison overcrowding and a demand for viable alternatives. The search for the rationale for the Irish community service order begins with the White Paper and the Oireachtas debates on the sanction. The legislation, as will be seen, differs in one particular respect to exclude the use of community service except in respect of custodial sentences. The chapter concludes with a consideration of the community service order within the sentencing modalities of the different criminal court jurisdictions in Ireland.

Chapter 4 examines a possible expansion of the role for community service under Section 115 of the Children Act 2001 where courts which deal with 16 and 17 year old children may now impose a community service order without firstly apparently, deciding to impose a custodial sentence. This departure from, and attempted expansion of, the policy fixed in the 1983 Act presents the first opportunity to see the sanction operate other than in strict conformity with the decarcerative approach. The writer argues that such a policy rupture may not be possible due to the manner in which the legislation was framed but attributes such anomalies to an inadvertent adaptation of the legislation which was used earlier in England and Wales.

In Chapter 5 the suspended sentence is introduced with particular reference to its obscure origins in Irish sentencing practice. It is observed that the sanction emerged as an assumed inherent jurisdiction of the sentencing court without any legislative framework or articulated rationale. The formal imposition of a custodial sentence which is then suspended points to the avoidance of custody as the principal aim of the sanction. However, the desire by the judges to control the future behaviour of offenders is seen to compete as an informal aim of the sanction. This leads to a discussion on whether the suspended sentence is actually connected to the custodial sentence at all instead of occupying a space somewhat closer to a conditional discharge. The opportunity to suffer a custodial sentence is placed in abeyance and the offender is given a suspended sentence. But what is the relationship between the offender and the court where the offender is compliant – is the offender "contractually" protected against the custodial sentence? This relationship is explored fully in the chapter. But the meaning of the suspended sentence must emerge fully from the cognitions of the judges themselves who offer their views on the selection of suitable offenders and the purpose of the sanction.

Chapter 6 takes a more "nuts and bolts" approach to the sanction of the suspended sentence in Ireland. The sanction is seen to propagate into a variety of species such as the wholly suspended sentence, the part suspended sentence where the offender initially enters into custody, the reviewable sentence and its apparent demise and finally the District Court hybrid where the warrant of execution is withheld pending compliance by the offender for a fixed period of time. The sanction is then dissected into its constituent parts where time elements relating to the custodial period and the period of suspension are discussed. Central to the suspended sentence is the required compliance with specific conditions which structure the sentence. Particular problems relating to the activation of the suspended sentence are analysed such as the discretion exercised by the prosecution to commence revocation procedures and the standard required to prove breach. Additionally the discretionary practices of the courts themselves when considering a breach are discussed which may throw light upon the original intention of the sentencing court. The chapter concludes with a discussion on the practices of the judges and speculates on the hidden purposes of the sanction.

Chapter 7 is dedicated specifically to an examination of the statutory form of suspended sentence introduced in 2006 under Section 99 of the Criminal Justice Act 2006. In particular the traditional form of suspended sentence is discussed in light of the new statutory procedures. The purpose of the suspended sentence is again discussed in context of the statutory powers given to suspend a term of imprisonment. Certain difficulties which were identified as a feature of the common law form of suspended sentence are re-examined in light of the new enforcement architecture provided in the legislation. Moreover the judges' views on the new procedures are presented to see if there is to be an abandonment of previous practices and what this might prefigure for future practice. Additionally, the traditional role of the Probation Service is seen to be further challenged in this new procedure where the probation officer may be cast in the role as an enforcement agent for the court.

A few housekeeping matters require to be settled at this point. For consistency in style offenders, prosecutors and judges are referred to throughout in the neutral form as she/he or him/her. Any reference to the criminal justice system in the text encompasses the investigation, prosecution, trial and punishment of offenders and is not to be read as a

reference solely to the function of the courts within that wider context. And finally, the investigation of community service orders and suspended sentences in Ireland is fixed as of the end of October 2008. Indeed had such a point been fixed at the beginning of this study in 2003, the statutory form of suspended sentence discussed in chapter 7 and the attempted breach of the policy to tie community service with the custodial sentence, discussed in chapter 4, would quite simply not have seen the light of day, at least in this study.

CHAPTER 1

THE COMMUNITY SERVICE ORDER; THE BIRTH OF A NEW PENALTY

INTRODUCTION

The community service order which is a standard form of sentence in most Western countries in the 21st Century is a phenomenon of relatively recent vintage. While work related penal sanctions have been around for centuries and in this context community service orders had been said to have a long past, the history of the community service order itself is surprisingly short (Kilcommins 2002). The formal community service order only emerged in the latter quarter of the 20th Century as a sentencing disposition.

In this chapter the writer sets out to explore the emergence of the distinct penalty of community service by reference to its proximate and historical antecedents in order to contextualise and locate the everyday penalty used in the Irish criminal courts. Contemporary influences, especially the introduction of the penalty in the neighbouring jurisdiction of England and Wales, are explored in detail as the writer contends that the form of community service order introduced in England and Wales in 1972 provided the template for its later introduction in 1983 in Ireland. The emergence of the penalty in the former jurisdiction was preceded by a consultative process and a report known as the Wootton Committee Report which drew upon a number of submissions and contemporary penal practices in other jurisdictions. This process and report are examined to analyse the rationales for the introduction of a new penal sanction at that particular time. The chapter further explores the claims about historical precursors of community service from earlier work based dispositions, with particular reference to claims of direct lineage between community service and the punishment of impressment. The emergent penalty is examined against the backcloth of a rapidly changing social and economic order in post-war Britain where the economic and social policy of the welfare state and the interventionist paradigm is seen to be well established in every day life. In this context, issues relating to the criminal justice system fall under the gaze of public, official and academic scrutiny.

In addition to the general, social and political enquiry which gives context to the emergent penalty, the chapter examines in detail the factors and pathways which allowed the sanction to become manifest at this particular time. The emergence of any new penal sanction should always be scrutinised to ascertain whether the new sanction is merely an additional sentencing option in the sentencer's armoury to be selected from a menu of dispositions or whether the new sanction serves a specific purpose either in relation to custodial punishment, crime prevention, the rehabilitation of the offender, the prediction and curtailment of risk or some other function.

This chapter will discuss in detail the emergence, rationales and function of the non-custodial penalty of community service. As already stated this sanction is identified as central to any consideration of alternatives to custody, coupled as it is to the direct imposition of a custodial penalty if the penalty is breached. It is hypothesised in this study that the use of community based penalties and in particular the penalty of community service is underutilised by the Irish Courts in the disposal of criminal convictions, despite significant reports which suggest that imprisonment should be the sanction of last resort. (Whitaker:1985; Law Reform Commission :1993, 1996).

A. GENESIS OF AN IDEA

Community service orders were first introduced in Ireland under the Criminal Justice (Community Service) Act 1983. The precise antecedents of the penalty of community service in Ireland are disputed. For however much the search for the proximate as opposed to the historical roots of community service are contested, the Criminal Justice (Community Service) Act 1983 as enacted by the Oireachtas resembles almost verbatim, except for a few notable exceptions which will be discussed later, the legislation introduced in England and Wales in 1972 under the Criminal Justice Act of that year which was largely consolidated and superseded by the Powers of Criminal Courts Act of 1973 as amended by Section 12 of the Criminal Law Act of 1977. The legislation enacted by the Oireachtas in 1983 was so close to the legislation in England and Wales, that Deputy Kelly remarked:

> "This is simply one more example of the ignominious parade of legislation masquerading under an Irish title 'An Bille un Cheartas Coiriuil (Serighis Pobail) 1983'; which is a British legislative idea taken over here and given a green outfit with

silver buttons to make it look native" (Dail debates, vol V 342, col.169, 3rd May 1983)

The introduction of community service orders in Irish sentencing law was heavily influenced by the legislation in England and Wales of a decade earlier. This was acknowledged by the Minister for Justice Mr Noonan, in a reply to Mr Kelly's criticism that the Irish Legislature was simply transposing the legislation from the old imperial parliament at Westminster; an issue not without its political sensitivities (O'Mahony 2002: 5-6). In order to widen the scope of the debate, the Minister for Justice (Mr Noonan) protested that the idea of community service originated in New Zealand rather than in Britain but conceded that it was more appropriate to study the operation of community service in Britain, as their norms are closer to the norms of Irish society than of any other countries where community service orders operate (Dail Debates, vol 342, col.320, 4th May 1983). The reference to New Zealand as the originator of the concept of community service was later reasserted in the Whitaker Committee Report (1985).

A comparison of the elements and structure of community service orders in England and Wales and the Periodic Detention Order in New Zealand by Jennings (1990) suggests that the format for community service orders in England and Wales was largely influenced by the preceding New Zealand practices and legislation of 1962 (Criminal Justice Act 1962).

Indeed as early as the 1950s a practice had developed in New Zealand of attaching a condition to probation orders whereby the offender on probation was obliged as part of his/her probation to carry out certain unpaid tasks of work in the community. The early practices which amounted to community service in New Zealand were questioned within that jurisdiction on the grounds that there was no legal basis upon which an offender could be obliged to work as a condition of a probation bond and there were concerns that the conditions attached to a probation order in this manner might breach international obligations entered into by the state of New Zealand to prohibit slavery.

Community service orders were introduced by statute in New Zealand on 1st February 1981 by the Criminal Justice Amendment Act 1980 as a formal penalty reflecting the legislation and practice of a decade earlier in England and Wales. The penalty of community service may have found its genesis in New Zealand but paradoxically the idea,

having been exported from the Antipodes to England and Wales, was re-exported and recycled back to New Zealand as a formal sanction. (Leibrich 1985; Jennings 1990; Armstrong 1983). A certain element of uniformity with the structure of the community service order in England and Wales becomes discernable in the jurisdictions which enacted community service as a sanction, especially in the common law countries of New Zealand, Australia, Ireland and Canada. The essential elements of community service, to wit:- a community-based punishment intended to act as an alternative to custodial penalties, a consensual acknowledgement by the offender to perform unpaid work in the community and a uniform maximum of 240 hours unpaid work to be performed by the offender within one year are reflected in most of these jurisdictions.

Although in Germany the use of community service is now established as a penalty for default in the payment of fines, early experiments by some German judges proved to be quite innovatory as punishments. In particular one German judge in the 1950s forever remembered by the title the "chocolate judge" obliged offenders to give up their time by visiting sick and disadvantaged children and by giving sweets (Little 1957:27-31).

The American and Canadian literature universally acknowledges England and Wales as the initiators of community service orders (Menzies and Vass: 1989:207; Harland 1980: IV, 426; Silberman 1986:XII,131-132) and in particular point out the report of the Sub-Committee of the Advisory Council on the Penal System (Home Office 1970) as the primary source of the concept of community service orders. The Sub-Committee which reported to the Advisory Council on the Penal System in 1970 was chaired by Baroness Wootton (hereafter referred to as Wootton Committee Report). The British literature on the emergence of community service orders focuses almost exclusively upon the Wootton Committee Report as the originator of the concept of community service, although the Report itself does draw significantly upon the earlier New Zealand model referred to previously. Ultimately, the emergence of community service as a separate penalty in Irish sentencing law can be traced to the procedures introduced in England and Wales in 1973. Accordingly an examination of the extensive literature on the sanction as it applies in England and Wales and in Scotland will provide the most informative overview of the emergence, rationale and operation of community service orders. Save for a few notable exceptions between the Irish and English legislation, the legislative format and elements of the sanction are strikingly similar to the extent that there is little textual difference between

certain sections in the respective statutes. Moreover the two agencies most closely associated with the implementation of community service orders in both jurisdictions, namely the Courts and the Probation Service, share common roots through the common law and the Probation of Offenders Act 1907 which applied across the United Kingdom of Great Britain and Ireland. The Probation Service in Ireland which was established in its present form in 1970 owed much to the traditions and ideological outlook of the Probation Services in England and Wales about that time.[9] Many Irish probation officers and social workers had trained in British universities and shared common outlooks with their colleagues there (Halton 1979).

B(i)

COMMUNITY SERVICE A MODERN PENALTY OR A REINVENTION OF PREVIOUS SANCTIONS

One of the surprising aspects in the literature on community service is the frequent assertion that community service may have existed in embryonic form for centuries before it was formally established in the early 1970s. Previous work related sanctions are identified by a number by a number of writers as precursors of the sanction (Taylor 1991). Such preoccupation with previous work related sanctions however may obscure the emergence of different understandings of community service as a discrete penal sanction which may not otherwise have emerged had the penal, social, cultural, political and economic landscape been different.

This section sets out to explore whether the community service order which emerged as a penalty in England and Wales in the latter quarter of the 20th century was in fact influenced by historical antecedents of punishments and which if any contemporary social features may have advanced its arrival at that particular time.

9 Prior to 1968 there was no full time probation officer outside of Dublin but voluntary probation officers were appointed under Section 7 of the Criminal Justice (Administration) Act 1914 for the cities of Cork, Limerick and Waterford from such organisations as the Society of St. Vincent De Paul. In Dublin in 1950 8 full-time probation officers were similarly assisted by members of the Legion of Mary. By the 1960s the number of full time probation officers in Dublin had fallen to 5 with a caseload of 250 cases. However between 1970 and 1974 the service was significantly expanded by the appointment of 47 professional full-time probation officers who worked throughout the State. (Kilcommins et al 2004: 49-53).

Any attempt to locate the origins of diversionary penal measures proves to be an impossible task, according to Vass (1984: 7). A particular difficulty presents when comparing contemporary penal measures with those of earlier periods (Kilcommins, 2002). For example, in contemporary criminal law the theft of a horse under Section 4 of the Criminal Justice (Theft and Fraud Offices) Act 2001, might warrant on summary conviction an fine of up to £1,500 or 12 months imprisonment or both; historically the same offence was a felony for which the penalty was death. The use of the death penalty was not always imposed and Vass (1984) has identified a number of diverse alternatives which emerged between the 16th and 18th centuries as modes of punishment in their own right but which also served as expedients for economic stringencies such as prison overcrowding and the attendant costs, the need to provide manpower in the emergent colonies and the establishment of sufficient military and naval strength in time of war, through the process of impressments.

The historical antecedents of community service have been closely evaluated by a number of writers such as Anthony Vass (1984) Kenneth Pease (1980) (1981) (1977) (1975) and Young (1979). A number of alleged precursors to community service have been identified in the literature and in particular to punishments which obliged the convicted person to provide a significant contribution of personal service whether by way of manual labour or military skill for the benefit of the State. These included bridewells, workhouses, hulks, transportation and impressment.

While Pease (1980: 1) has suggested slavery could be seen as one of the less reputable forbears of community service, cultural acceptability of slavery as a punishment in 21st century Western societies would be immediately and universally rejected. Nonetheless, a claim of a direct lineage of community service from the former practice of slavery challenges a contemporary researcher to view community service as a continuation of former severe punishments which have now been repackaged in a more culturally acceptable manner.

Garland has suggested a contextual framework of penality thus:

> The intensity of punishments, the means which are used to inflict pain and forms of suffering which are allowed in penal institutions are determined not just by considerations of expediency but also by reference to current mores and sensibilities.

> Our sense of which constitutes a conscionable, tolerable, or civilised form of punishment is very much determined by these cultural patterns, as is our sense of what is intolerable or as we say inhumane. Thus culture determines the contours and outer limits of penality as well as shaping the detailed distinctions, hierarchies, and categories which operate within the penal field (Garland 1990: 195-196).

Accordingly, if one accepts at face value Pease's assertion that community service is descended from earlier work related penalties such as impressments and even from slavery, the penalty remains essentially the same but is modified by cultural determinants to make it more acceptable as a modern penal disposition.

FORMER WORK BASED PENALTIES

Bridewells

Like other work related sanctions, bridewells were established to deal with vagabonds and petty offenders where the use of hard work was used as a means of reducing perceived idleness. The application of work was seen as a corrective measure in the reformation of character (Vass 1984:9).

Workhouses

Workhouses were introduced to give relief to the poor but only upon condition that the impoverished and petty criminals would enter the workhouse and support themselves by hard work. Otherwise, it was argued, the impoverished and undeserving would take relief from the Poor Law Unions without recompense. By centralising the recipients of Poor Law Relief within the workhouse it was possible to extract economic benefit from the recipients of the relief in addition to imposing a significant degree of social control over them. The Vagrancy (Ireland) Act 1847 created the offence of wandering abroad without visible means of support. In the same year the Great Famine in Ireland had the effect of driving large numbers of impoverished people into the workhouses of Ireland. The pincer effect of criminalising destitution on the one hand and providing an early form of social welfare relief through the Poor Law Union workhouses on the other were combined to promote the entry of families into the poorhouses which required their separation by sex and age. Whether as individuals or as families, those who entered the workhouses were obliged to support themselves by hard work in exchange for shelter and sustenance. (O'Connor 1995; May 1997)

Hulks or Prison Ships

The Act which originally allowed for the use of hulks in 1776, contemplated its use for the containment of the most "dangerous and daring" prisoners. However, the prison ships became regular recipients of all ages and degree of convict including the very young and the infirm. Such cramped conditions on board were not insignificant in the very high mortality rates among the ship's population.

Hulks or demasted ships were used in harbours to accommodate prisoners. These so called "Hulks" were used to dredge rivers such as the Thames and the prisoners contained within the hulks or prison ships were obliged to work in the drainage schemes (Vass 1984:10).

Transportation

Transportation to colonies of the British Empire was used both from Ireland and Britain over a long period of time. An earlier example was the use of transportation to the West Indies of defeated Irish soldiers and their families after the Cromwellian Wars in the middle 17th Century. With the growth of the colonial enterprise in the 18th and 19th Centuries transportation became a regular feature of punishment. Under the Transportation Act of 1718 the American colonies received some 30,000 convicts between the years 1718 and 1775. Many of those transported had secured a reprieve from a death sentence which would then be substituted with a term of transportation for a specified number of years.[10] While reform of the offender may have been advanced as an aim of transportation, the objective of crime control at home may have equally predominated. Even though the American War of Independence effectively foreclosed the use of North America as a destination for transported convicts, the practice of transportation to that colony was already in decline. For some convicts, transportation presented an opportunity to start up a new life with greater prospects than those available at home. Thus the prospect of transportation presented no real deterrent for many. The Revolutionary War in North America provided a hiatus in the use of transportation as a penal remedy.

10 For example a certain James Dalton was spared the death penalty for mutiny on board ship and was sentenced to transportation for 14 years. Upon landing in the New World he was sold into servitude for the period of his transportation. In the event, Dalton proved incorrigible by threatening his master with a knife and was left to his own devices. Thus in the example given the reformative objective of transportation must be seen to fail but the sentence did advance the objective of ridding England of a dangerous offender (Rawlings 1992:96-97)

Increasingly during this period, prisoners especially those deemed the most dangerous of convicts were accommodated on prison ships or hulks. Fortuitously, the discovery of Australia and the grand design to develop that new colony provided a new opportunity to the authorities to resume the practice of transportation of convict prisoners. The selection of skilled and able bodied prisoners for transportation to the new colony underlined the economic exigencies behind the use of the sanction (Hughes 1987:1-2).

The colonies of New Zealand, Tasmania and Australia required a constant flow of labour and this requirement comported well with the desire on the part of the authorities to reduce the cost of incarcerating prisoners at home. Essentially transportation involved the banishment of offenders to the American colony between 1718 and 1775 and Australian Colony between 1787 and 1867 where punishment was extracted from the offenders through the performance of hard work on a graduated basis under various schemes for the performance of a sentence of transportation, (Hughes 1987). Sometimes convicted persons were allowed work for colonists and free settlers in the Colonies, essentially as farm labourers. These became known as "Ticket of Leave" men, whose class would emerge over time as a significant force in the founding of Australia (Hughes 1987). Such convicts who would receive a partial liberty were allowed live in a non-prison setting and this provided at least a partial reintegration with a community albeit at the other side of the world. This reintegration element, through working within a community, it could be argued, was a precursor to the introduction of the community service in the former Colonies of Australia and New Zealand. (Leibrich 1985)

Impressment

Impressment, which dates back to 1602, entailed the enlisting into service in the Army or the Navy of convicted criminals as a method to avoid the death penalty, transportation or imprisonment. According to Pease impressment has "some intriguing characteristics" when considered in relation to community service (1980:1). The procedure for impressments was provided by Statute in 1602 when it was pronounced by the Monarch:

> "Our desire is that justice may be tempered with clemency and mercy … Our good and quiet subjects protected ... The wicked and evil disposed ... and the offenders to be in such sort, corrected, and punished that even in their punishment they may yield some profitable service to the Commonwealth." (Ives, 1914, cited in Pease 1980:2)

Many of these commentators have argued that community service is a direct lineal descendant of work-related sanctions of an earlier period and carries with it to a significant degree, the elements of compulsion and control of the offender. Pease (1980) argues that consent to impressment was not always absent reciting the provision of the Insolvent Debtors Relief Act 1670, which allowed debtors who were unable to buy their way out of prison, a means of escape by joining the Navy. When considering the element of the indeterminate nature of impressment he cites the Debtors Act 1703, which limited the duration of impressment to the period of the duration of the War.

The modern community service order in contrast requires the convicted person to give his or her express consent to perform a specified number of unpaid hours work in the community. It is obligatory on the Court to explain to him/her the nature of the work, the conditions of attendance at such work programme and the quality of work required. Additionally, the penalty of community service is limited to 240 hours maximum to be performed within one year.

Notwithstanding this, the convicted person is obliged under penal sanction to provide personal service of labour or skills to answer for the crime committed.

Perhaps the most contested views concerning the geneses of community service relate to claims that earlier work related sanctions provided a prototype for the new sanction. This claim to historical antecedence for the community service order is particularly expressed when dealing with the work related sanction of impressment but the claim is challenged by a number of writers who view community service as a wholly new penal concept.

During the periods when impressment was used as a sanction, very many prisoners were incarcerated under sentence of death for the commission of felonies. Impressment into the army or navy presented as a choice between life or death for the condemned prisoner. No doubt, during times of War the mass clearing out of prisons by impressment served a number of other functions such as the relief of overcrowding, removal of offenders from their localities if due for release and significant financial savings in the housing, guarding

and feeding of such prisoners. The latter considerations add a certain resonance to the debates which preceded the introduction of community service in England and Wales.

Impressment therefore provided a system whereby a convicted offender could avoid the death penalty or squalor in prison for perhaps an equally harsh indeterminate posting with the army or the navy. Generally speaking however, the period of time for impressment would be confined to the duration of a current war before the offender was delisted. Vass identifies the use of impressments as a move to establish a penal sanction which could reconcile various needs, including a reduction of pressure in the prisons by allowing prisons to be used as recruiting depots for sailors and soldiers, the banishment of the criminal to foreign lands or to sea thereby bringing social calm to the local community and by reducing the death penalty which by the early 19th Century began to be seen as a brutal and inhumane method of disposal (Vass 1984:11). The confluence of political, economic and social needs with penal disposals was identified thus by Radzinowicz:

> This convenient interchangeability between the penalties of death, transportation or imprisonment and forcible enlistment in the army or navy became established by statutory authority and administrative precedent, with impressment emerging as a powerful measure of crime prevention and de facto legal sanction. Like transportation, it provided protection and a sense of security by long term elimination of offenders from society as well as satisfying a national need. Together with transportation, it came to represent one of the major expedients of British penal policy (1968:96).

Certain cautionary prescriptions in relation to the make up of military regiments and the make up of community service work groups reflect similarities between the two penalties. Military commanders did not favour regiments made up solely of impressed soldiers, as they feared difficulties in relation to morale and discipline. These concerns were to be reflected many years later when community service was introduced where certain writers (Uglow 1973; Vass 1984; Young 1979; and Jennings 1990) cautioned against offender-only work groups, which are regarded as the least satisfying arrangements for offenders and may encourage non-compliance in the completion of the community service order.

The use of impressment must also be understood in the context of political and economic exigencies. The Land Enclosure Movement in the latter 18th Century created significant social unrest among the dispossessed cottier classes. The use of impressment into the army or the navy acted as a safety valve against social unrest which occasionally manifested in agrarian riots.

Whatever the attenuated similarities with preceding work-related penal sanctions, Kilcommins (2002) cautions against viewing community service as the inevitable outcome of some unfolding logic, demonstrating that the history of community service is not a history of programme refinement of the modern modality of punishment.

Specifically, Kilcommins challenges the conventional view expressed by Pease (Pease 1980) that community service had a long history dating back four hundred years. Pease's conception of impressment, he contends, is methodologically flawed as it is constructed upon a teleological paradigm which precludes the possibility of viewing the past other than in terms of the present. Although impressment involved the substitution of imprisonment with naval or military service, the similarity with community service is over-stretched in Pease's analysis through a process of exclusion of features which do not fit neatly into the linear history of work-related sanctions. In particular the essential elements of the denial of leisure and rehabilitation are historically absent in the earlier work-based dispositions. Rather than presenting impressment as a proto community service order, Kilcommins points to discontinuities between impressment and community service which invites an understanding of community service as a discrete modern disposition which can only be properly understood in the context of contemporary rather than historical referents. (Kilcommins 1999:240).

Rehabilitation, Kilcommins contends, must be understood as a feature of the modern penal welfare structure identified by Garland, rather than as an enduring element of penological sentiment and practice of an earlier age:

> As such, rehabilitation is very much part of the modern penal welfare structure, prompted, as it was, by the rise to prominence of psychologists, probation officers, social workers and educationalists; by the movement, where possible from encellulement to association; by the displacement of the moral consciousness concept of criminal behaviour (moralism) with a more inductive, individualised approach (causalism); and the adoption of science as a proper means of reclaiming offenders. Given these criteria – criteria which would not have remained constant and continuous over time – it is submitted that it is a historical myth to propose that an analogy can be drawn

between community service and impressment vis-à-vis rehabilitation. (Kilcommins 1999:251).

Rather than seeking to rehabilitate the offender during the latter part of the eighteenth century, on the contrary, the primary purpose of impressment was to exploit the skills of convicted persons who had sea-faring experience. The immediate need to provide sufficient sailors for war ships in times of conflict was met by a corresponding supply of sailors through the various methods of impressment one of which was through the criminal courts and the prisons. However, the popular notion that impressment was used extensively to clear out prisons to fill the companies of war ships is challenged by reference to the practice of the navy not to accept, to any great degree, prisoners who had no experience of ship-board life.

Perhaps the strongest argument by Kilcommins in support of the distinctive nature of community service as a sanction, which cannot be traced to earlier work based sanctions, is revealed in his analysis of community service as a denial of leisure:

> It was only when society had been made consciously aware of leisure as a distinct element in its 'rhythm of life' that the authorities could begin to deprive an individual of it as a means of social control (Kilcommins 1999:249).

The Wootton Committee Report specifically ruled out the possibility of community service being imposed on an offender which would intrude upon his work time or time dedicated to educational or vocational training or religious duties (Home Office 1970 par. 39). The community service order was to be performed only during leisure time. Having traced the emergence of leisure over the three periods of pre-industrial society; where work and leisure were closely associated with the narrow locality of craft or farm; through the early and late periods of industrialisation where the almost total control of labour in the factory negated the very existence of leisure time; to the progressive period of the nineteenth century which slowly ceded more leisure time to industrial labour Kilcommins concluded:

> It is only within this modern framework that leisure became established as an enshrined right and internalised social norm. … (that) leisure has established itself, particularly since the Second World War, as a distinct and separate component within the structure of society (Kilcommins 2000:43-44).

Leisure therefore has no true antecedent in the earlier work based penal sanctions, such as impressment, which involved the exploitation of labour to perform the function of defending the state against its enemies in time of war, which function required a full time commitment both night and day and where the offender impressed into the army or the navy was under constant military or naval control until discharged. Moreover the function of defending the state against its enemies must be classified as essential to the very existence of the state itself, whereas in the modern conception of community service the work to be performed is classified as work which, if not done voluntarily, would not otherwise be done (Home Office 1970). Thus the very nature of the work to be performed under a community service order when compared with impressment cannot be similarly compared.

Kilcommins' conclusion is to eschew the temptation to seek historical precedent over a long time span, the method deployed by Pease and Radzinowicz, warning that such an exercise is likely to founder upon the problems posed by historiographic anachronisms while

simultaneously diverting the investigator away from more fruitful analysis of community service such as the cultural determinants and current penal practices which will be discussed presently. By use of this method of analysis makes a convincing argument to suggest that community service is a discrete modern penal sanction.

The emergence of the sanction in 1972 in England and Wales therefore, may be seen not as a result of some inevitable unfolding of historical logic or the re-manifestation of previously deployed and abandoned penalties. In this sense community service may be said to have a long past but a distinctly short history (Kilcommins 2002).

The historical roots of community service remain contested, as is evidenced above, but the evolution of community service over the 33 years of its existence in England and Wales also reveals certain dynamics which, when examined, disclose a sanction originally posited as a denial of leisure time for the performance of voluntary work, tasks of a social or personal service to the community. A significant feature of the penalty according to the Wootton Committee was that the sanction would have a punitive 'bite' according to sentencers. Increasingly the character of community service has changed over the 33 year period to be renamed in England and Wales as a "community punishment order" in the Criminal Justice and Court Services Act, 2000 with some sentencers expressing views that those given community service orders should in effect suffer physically by having to break into a sweat when performing community service, to suffering shame in public by wearing distinctive orange work vests to identify the convicted offenders as such. While the introduction of community service is contested in terms of historical antecedents, the contemporary landscape of penal philosophy relating to community service has not remained static either.

While the legislative architecture of the modern penalty of community service accommodates the denial of leisure time as a central purpose by excluding the use of the sanction for times which would interfere with employment, religious duties and education and in this sense the sanction must be considered unique, the introduction of community service did not come about without significant pressures from more contemporary exigencies such as prison overcrowding and costs which will be discussed in the next section. In that context it may be unwise to regard the introduction of the community service order solely from a perspective of criminological or penological theory as the hidden hand of pragmatism may equally have provided the critical momentum to introduce community service in response to immediate problems relating to the use of prisons.

B(ii) THE CONTEMPORARY CONTEXT FROM WHICH COMMUNITY SERVICE EMERGED

The arrival of community service in England and Wales in 1972 is best identified at the confluence of the penal, social, cultural, political and economic conditions which prevailed at that time. Some of these conditions presented as proximate or hard factors which arguably made the arrival of the sanction imperative. These factors included prison overcrowding, prison costs, the perceived failure of the prisons entirely and the perception that other alternatives had failed also. Simultaneously, wider cultural, social and political factors operated as distal influences which gave context to the pragmatic considerations mentioned earlier. These included the rise of the welfare state, the emergence of youth culture and the identification of a role for the community itself as part of the solution to the "problem" of crime and punishment.

The development of the idea of community service must be considered in the context of contemporary factors such as the purpose and efficacy of imprisonment as understood in the mid to late 20th Century, the economic exigencies attendant on imprisonment, the use of less costly alternative sanctions, and the purpose and efficacy of extant non-custodial sanctions. Financial considerations gave the debate on alternatives to custody a cogency which was lacking when other sentencing objectives such as deterrence and rehabilitation were discussed. The need to establish further community based penalties, notwithstanding experiences with suspended sentences was seen as imperative to ease prison over-crowding. However, the over-riding concern, although less stated in debates, related to economic strictures in sustaining an ever-growing prison population.[11]

(i). Prison Overcrowding

The prison, originally designed for the reception and holding of prisons on a cellular basis, with a view to reform through observation and categorisation, was increasingly used as a place of detention only, due to constant deployment of cells for holding multiples of prisoners. Prison overcrowding itself lent a negative feature to the presumed reformative attributes of prison. While the number of immediate prison sentences passed, as a proportion of the total number of sentences imposed on offenders convicted of indictable offences steadily fell during the period 1948-1968 the prison population of England and

[11] It is interesting to reflect on that aspect of prison costs in the late 1990s in Britain in light of the now famous speech given by the Home Secretary, Mr Michael Howard, at the Conservative Party Conference, where he proclaimed "prison works" and that further prisons would be built in support of a policy dedicated on deterrents.

Wales rose during the same period due to two factors according to Young (1979:6).[12] Firstly, while the proportion of cases in which the Courts resorted to custodial sentences fell, the actual number of receptions under sentence into penal establishments rose due to the enormous rise in the total number of persons convicted of criminal offences. Secondly, there was a slight increase in the length of prison sentences imposed over the same period.[13] The combined effect of these two factors inflated the prison population resulting in chronically overcrowded establishments.

(ii). Prison Costs

This foregoing pattern was certainly expected to continue, giving concern among policy-makers about the inordinate costs[14] of keeping ever-increasing numbers of prisoners in custody, either in over-crowded prisons or in newly constructed prisons with all the attendant costs. As this pattern became increasing clear, the search for alternatives to custody grew apace. Moreover, there was an expectation that social reconstruction after the War would lead increasingly to a reduction in crime as the promises of the welfare state were applied to the presumed causes of criminal behaviour. These included programmes for the provision of free health services, social insurance, the provision of free education and social housing. Crime could be eliminated, so the optimism of the times predicted, through significant application of resources to areas of need (Driberg 1964).

(iii). CRIMINOLOGICAL CONTEXTS

The Failure of Other Alternatives

The introduction of another non-custodial sentence, namely the suspended sentence, in 1967 in England and Wales had been heralded as a specific measure to intervene instrumentally in easing the burden of custodial institutions. Under the procedure of the suspended sentence a convicted offender would be given a specified sentence which would then be suspended for a specified period of time. And yet by 1972 considerable dissatisfaction was expressed in relation to the operation of this recently introduced non-

12 In 1948 the daily average prison population was 19,318 which increased to 31,984 in 1968. The actual number of receptions into penal institutions rose from 32,865 in 1948 to 49,258 in 1968 in England And Wales (Young 1979 p.6).

13 The proportion of prison sentences of over two years imposed by higher courts rose from 15% in 1948 to 26% in 1968.

14 The Wootton Committee estimated that in 1971 it cost £22 sterling per week to keep a prisoner in custody while they judged the average weekly cost of a community service order would be £1 sterling per week (Home Office 1970: par. 9).

custodial measure (Oatham and Simon 1972). A particular criticism of the new measure was that it was applied inappropriately to offenders who should not have had their prison sentences suspended as these would be considered too serious for the application of a community-based sanction. These serious or deep-end offenders, it was said, should not receive a suspended sentence. The application of suspended sentences to offenders, who previously would not have received a custodial sentence, was equally criticised as a sentencing disposition which potentially increased the level of severity of the penalty in respect of that category of offender. Increasingly, such offenders who would not previously have been given a custodial sentence would, upon breach of a suspended sentence, be at higher risk of receiving a custodial sentence.

The early experience of suspended sentences as a solution to the issues of custody provide an interesting template against which any subsequent alternative custodial measures which might be introduced, could be compared. In particular, issues relating to the criteria for measuring the number of hours to be worked in community service orders, the alternative custodial/non-custodial penalty, the factors which constitute a breach of the community service order, and the discretion afforded to the court or its penal agents in imposing the alternative penalty upon breach were identified. These issues were to surface again in the operationalisation of community service orders, issues which to some extent were foreseeable in light of the earlier experiences with suspended sentences.

The 'Failure' of Prisons

Prison was perceived to be ineffective notwithstanding the human, social and financial investment involved. Despite its enduring nature, the prison was increasingly perceived as a failure in terms of prisoner rehabilitation, especially when accompanied by chronic overcrowding.

Public sentiment as expressed through the political discourse of the period (Labour Party Study Group 1964; Conservative Party Study Group 1966) increasingly questioned the use of imprisonment as a sentencing measure and the Home Office in the late 1950s and 1960s increasingly questioned the efficacy of short terms of imprisonment and the efficacy of longer terms of imprisonment to impart training as rehabilitation.

Thus, against this bleak background of recognised failure by the prison either to reform by long-term sentences or to deter the commission of further offences upon release, the belief, but not necessarily the knowledge, that non-custodial sentences might prove more successful as an alternative emerged (Brody 1976; Lipton 1974; Martinson 1974).

(iv). The Search for Alternatives

In the political arena, both sides of the political debate maintained that the root causes of crime and its continuance as a social problem emerged from quite different sources. The British Labour Party Study Group (1964) suggested the continuance and indeed the paradoxical increase in crime during the same period was due to insufficient application of resources to areas of need such as housing, education and employment. On the other hand the Conservative icon Mr Enoch Powell attributed the increase in criminal behaviour to the abrogation of personal responsibility engendered by the very same social collectivism of the Welfare State (Young 1979:13).

Despite these divergent explanations of the phenomenon of continuing crime in an era of social provision, the search for an alternative to custodial sentences proceeded apace. This was so, notwithstanding the existence of a number of other non-custodial sanctions available to sentencers in the period preceding the introduction of community service orders. The Advisory Council on the Treatment of Offenders (ACTO Home Office 1957) encouraged the use of non-custodial measures by the Courts and appeared to accept that existing measures if properly used were quite adequate as sentencing measures in the disposal of criminal cases. These sentencing measures which comprised mainly the fine, the probation order and the conditional discharge were increasingly subject to criticism for quite differing reasons. The fine procedure suffered significantly from problems of enforcement, coupled with restrictions imposed by the Criminal Justice Act 1967, Section 44, which limited the power of Magistrates to commit fine defaulters to prison. Concomitantly, the use of probation orders was called into question, with emerging studies showing little or indeed negative efficacy (Hammond 1957). Although the introduction of community service orders preceded the epochal study of Martinson (1974), certain sentiments were current about the use and scope of probation orders from the 1950s onwards. Barbara Wootton, who would emerge as a key figure in the emergence of

community service orders in Britain, summed up in a typically pithy fashion, her confidence in the efficacy of probation as follows:

> "... the Social Worker's best, indeed perhaps only, chance of achieving [the] aims [of traditional case work] … would be to marry her client. (Wootton 1959:273 quoted in Young 1979:8).

(v). SOCIAL AND CULTURAL CONTEXTS

The Welfare State

As the country re-emerged from the stringencies of the 2nd World War with rationing continuing into the 1950s, greater economic prosperity was accompanied by greater social mobility and leisure time. The British Prime Minister, Mr Harold MacMillan was able to pronounce by the late 1950s "Indeed, let us be frank about it … most of our people never had it so good" (1957, speech at Bedford 20th July 1957). Coupled with this social and economic change, the development of the welfare state with its social promise of caring for the citizen from the cradle to the grave was accompanied by emergent sentiments which regarded large institutions such as asylums (Scull 1977:78) and prisons as unnatural and inhumane (Young 1979:14). Thus, a certain change in the use of the prison as a solution to social problems was to emerge.

The Emergence of Youth Culture

Despite a widespread confidence that all of a citizen's needs would be catered for by the Welfare State, the economic and social changes wrought by the sustained period of economic recovery following the second World War presented new social issues which were incongruent with the traditions and conditions of an earlier age. In particular the emergent youth culture empowered by newly acquired affluence burst upon the scene in the 1960s. Previously this middle-generation was subsumed into either late childhood or early adulthood. But now a distinct economic and social force with less connectivity with traditional mores asserted itself. In many respects, this youth culture found its identity in an oppositional stance to the lifestyle and attitudes of the older and more settled communities of parents, families and traditional authority. This sense of alienation of certain social groupings was clearly identified in the Albemarle Report:

> We do not think it is easy or wise to speak glibly of a delinquent younger generation or a law-abiding older generation. This is only half of the story. What, to a person of forty or fifty, may show itself as a general malaise, a sense of emptiness, a quiet rejection of social responsibilities or a cautiously controlled cynicism, may show itself in an adolescent as an act of wanton violence, a bout of histrionic drunkenness or a grasping at promiscuous sexual experience. There does not seem to be at the heart of society a courageous and exciting struggle for a particular moral and spiritual life – only a passive neutral commitment to things as they are. One cannot, in fact, indict the young for the growth of delinquency without also indicting the older generations for apathy and indifference to the deeper things of the heart. (Ministry of Education 1960: para.6.3).

But public perception, fuelled no doubt by media agendas (Cohen 1971:229-230) conceived this emergent youth culture as a threat to the established order. The phenomenon of the Mods and Rockers which comprised two lifestyle movements in the early 1960s is a case in point.[15] Such was the pace of change generally during the 1960s and early 1970s, that the older generation could not connect with the emergent youth culture. Crime and vandalism were perceived as new and threatening features of everyday life, where the younger generation were perceived to be out of control (Pearson 1983:4-11). Despite these fears, whether justified or not, which were held by the older generation, their response to crime and vandalism and how society should treat such offenders was not one of condign retribution. Strong disapproval was expressed by this older generation but ultimately the restoration of property whether by restoring broken windows or cleaning up public areas damaged during public disorder was the preference of citizens to the punishment of vandalism and criminality. Instead of disposing of criminal cases by way of custodial sentences in respect of those belonging to this newly emergent grouping, public sentiment preferred the integration of the deviant within his/her own environment (Cohen 1985:77).

15 The "Mods" or "Moderns" adopted certain "cool" clothing such as zoot suits and hairstyles and professed an affinity for jazz. The "Rockers" on the other hand dressed quite differently in a biker style. Some clashes occurred between these two groups in Margate in the South of England in August of 1964. The print media exploited the event as a sensation by creating a moral panic in the minds of their traditional readership. Cohen reports that the sum total of Criminal Damage at Margate amounted to no more than £100 (Cohen: 1971).

The Community as Solution

Additionally, vast new social housing schemes, which were introduced as measures of slum clearance, uprooted traditional communities, albeit deprived communities, thus leading to social fragmentation and alienation. These new lifestyles, which were discontinuous with traditional living practices in the social and economic sphere, in large measure, redefined the meaning of "community". Concurrently the centrality of the community was seen as essential not only to the prevention of crime but also was trumpeted as the most appropriate venue for the reintegration of the offender who was originally of that community (Young 1979). Traditional communities, particularly urban communities, were under increasing pressures of change, particularly in respect of familial make-up and location. These self-same transitional communities were seen as the primary agents of change in the integration of offenders. A certain circularity suggests itself here. The notion that the pre-industrial, rural village community was free from crime due to collective social subscription and control may indeed seem naïve, but the image of the urban youth disconnected from the mores of religion, integrated neighbourhood, and having no regard for private property, brings forward a concept of the citizen constructed upon the idea of community which may have much less meaning when called upon as a solution to the problem of delinquency. These atomised communities lack the basic critical cohesion necessary to tip the very balance in favour of reintegration which gives rise to social alienation from these very communities in the first instance.

Thus, a certain paradox may be observed where the community is perceived both as part of the solution in the rehabilitation of the offender, but may also be identified as the location from which his/her criminality has sprung.

The criminal justice system itself was also seen as a contributor to this process of alienation. Firstly the trial and sentencing process involved stereotyping and standardisation of the offender as outsider (Becker 1963). And secondly, the systems of rehabilitation tended to reinforce the self-image of the offender and label him as someone in constant need, rather than emphasising the offender's normality, self-efficacy and autonomy (Bonta 2004).

While these latter factors may be seen to influence the emergence of community service at this time, the necessity to identify a penalty which was sufficiently punitive but would not require the actual incarceration of the offender, prevailed in the design of the sanction. Thus, by introducing a sanction which could avoid the application of a custodial sentence while at the same time making sufficient demands of the offender, it was argued, a significant number of those likely to be committed to custody might be otherwise diverted.

In the previous sections (A and B(i)(ii)) we firstly see the advancement of the idea of community service from the earlier uses of the sanction in New Zealand and in Germany as judicial experimentation but not formally structured by any clear legislative provision. The next section attempted to set out the contested claims of lineage to earlier work related sanctions, especially in relation to the practice of impressment. These claims are specifically challenged as erroneous applications of a methodology of history which seek to identify, to the exclusion of inconvenient counter (facts), factors of commonality with the contemporary sanction of community service. The contemporary context in which the community service order emerged is then examined to identify factors which may have influenced the emergence of the sanction at that time and the particular shape in which it finally did emerge. But the emergence of the community service order did not happen simply from a maelstrom of history or contemporary social and penal vectors. The proximate factors relating to prison overcrowding and the need to identify realistic alternatives to the custodial sentence presented the primary impetus to the introduction of the sanction. This was accompanied by the changing social, cultural and political context of the time where the idea of punishment in a community setting gained acceptance.

The community service order, as known today, was specifically shaped by a consultative process and enquiry under a committee chaired by Baroness Wootton whose work on the introduction of the community service order must now be addressed.

C. THE WOOTTON COMMITTEE REPORT

Having considered the context and influences giving rise to the emergence of community service as a modern penal sanction, it is generally acknowledged that community service orders as used in most common law countries, including Ireland, finds its immediate roots in the Report of the Sub-Committee of the Advisory Council on the Penal System under the Chair of Baroness Wootton in 1970. The Home Secretary had requested the Advisory Council on the Penal System in November 1966 to consider what changes and additions might be made in the existing range of non-custodial penalties, disabilities and other requirements which might be imposed on offenders, and, in this connection, to consider specifically the position of the professional criminal (Home Office 1970). The Sub-Committee Report was published in 1970.

The Committee interpreted its mandate essentially as a search for alternatives to custodial sentences and in particular as an alternative to the short custodial sentence. The Committee however did not consider the penalty of community service exclusively as an alternative to custodial sanctions but allowed also for the possibility of using community service orders as an alternative to existing non-custodial penalties.

> …We have also considered the need for a wider range of non-custodial powers for dealing with those who are not deprived of liberty. (Ibid: para.4)

In keeping with the premise that the search for alternatives to custody was driven essentially by considerations of prison overcrowding and escalating prison costs, the Committee targeted that cohort of prisoners which was perceived to be the primary contributor to escalating prison populations, namely the short term prisoner committed to prison for relatively minor offences. Although directed to pay particular regard to the professional criminal, they stated:

> "Although we have been directed to pay particular regard to the professional criminal, we have not seen much scope for the development of non-custodial penalties for offenders in this category, unless the definition of professional criminal can be said to embrace the ineffective and feckless minor recidivist who makes a precarious living from crime. There was general agreement amongst those whom

we consulted about the need for forms of supportive treatment which would enable this type of offender to be dealt with in the community. (Ibid:para.6)."

Departing significantly from the stated policy of the Advisory Council for the Treatment of Offenders (Home Office 1959) to consider policy changes only in light of rigorously tested procedures and against a critical background of scientific principle (Hood 1974; Bottoms 1979) the Wootton Committee suggested that the Courts should be given new powers "without more ado" (Home Office 1970:par 7). Eschewing the scientific approach considered appropriate for all further innovations in the area of penal sanctions, the Committee embarked upon an experimental approach which they explained in paragraph 7:

Many of our proposals, however, take the form of recommendations for experiment, in this context we would emphasise the need for evaluative research in every instance in which an innovation is introduced. We are well aware that every new form for sentence which is not definitely known to be more effective than existing measures increases the risk of a wrong choice on the part of sentencers. Moreover, in the present state of knowledge the possibility of such mistakes is unlikely to be substantially reduced by current methods of diagnosis and assessment since these can seldom predict more than the chances of an offender getting, or not getting, into further trouble, without being able to indicate how these chances might be modified by the imposition of any particular sentence. We do not, however, regard this as a conclusive objection to the introduction of any new measures; the solution is to experiment with such measures and to evaluate them. (Ibid: para.7)

The methods of enquiry used by the Committee, although consistent with methods of other enquiries - to consult and hear submissions - did not commission critical analytical studies against which the Committee could consider the submissions from interested parties, such as sentencers, whose views and indeed frustrations with sentencing options at that time appear to have influenced in no small way the deliberations and final recommendations of the Wootton Committee.

The consultative process used by the Committee, especially the consultations with sentencers, must be seen as central to their deliberations and recommendations. Sentencers explained that the choice of sentence was too limited, which caused sentencers to impose ineffective penalties where:

... a fine was in effect no penalty, because the offender was either well to do or dependant on his parents; and where a custodial sentence was in all the circumstances, and with all it involved, too harsh, or inappropriate in the sense that it would be likely to embitter or contaminate an offender who was not already steeped in criminal behaviour. (Ibid.: para.8)

This latter explanation offered by sentencers seemed to point to the need to create a new penalty which would act as a *via media* between the apparent ineffectiveness of fines and the harshness of imprisonment. As will be seen the Wootton Committee recommended this intermediate sanction and the enabling legislation created a penalty which was not necessarily an alternative to a custodial sentence.

Community service orders might be seen to emerge from this groundswell of perceived need on the part of those who contribute most directly to any increase or decrease in prison numbers, namely the Judiciary.

Describing as their most "formidable challenge" the need to devise an entirely new type of non-custodial penalty, the Committee resolved that "the recognised facts of the situation" required a new and radical development (Home Office 1970:par.30). This method of enquiry has been criticised on the grounds that it is based upon the application of pragmatic considerations to issues. The report does not reveal any wide-ranging discussion on the role of penalty in society as such, either in its contemporary setting or historically (Hood 1974; Bottoms 1984).

The Sub-Committee under Baroness Wootton regarded their proposal to recommend community service as its most radical, which would most likely meet the demands of sentencers who were "baffled by the difficulties of devising any satisfactory alternative" (Ibid:par.10) to imprisonment. Notwithstanding this specific mandate to identify non-custodial sanctions for professional criminals the Report clearly identifies offenders at the lowest end of the scale of seriousness as most suitable for community service when they stated:

> We have not attempted to categorise precisely the types of offender for whom community service might be appropriate, nor do we think it possible to predict what use might be made by the courts of this new form of sentence. While inappropriate for trivial offences, it might well be suitable for some cases of theft, for unauthorised

> taking of vehicles, for some of the more serious traffic offences, some cases of malicious damage and minor assaults. We have considered whether it should be legally confined to imprisonable offences, and while in general we hope that an obligation to perform community service would be felt by the courts to constitute adequate alternative to a short custodial sentence, we would not wish to preclude its use in, for example, certain types of traffic offence which do not involve liability to imprisonment. (Ibid: para37).

Thus the Wootton Committee recommended community service might be used for non-imprisonable offences and indeed in lieu of a fine thereby establishing community service not only as an alternative to imprisonment but also as an alternative to existing non-custodial penalties.

> Community service should, moreover, be a welcome alternative in cases in which at present a Court imposes a fine for want of any better sanction, or again in situations where it is desired to stiffen probation by the imposition on the offender of an additional obligation other than a fine. It might also be appropriate as an alternative to imprisonment in certain cases of fine default. We do not, however, think that it should be possible to combine a requirement to perform community service with a fine in respect of the same offence; community service and fines should be alternatives (Ibid:para37).

The wide application of the penalty of community service as envisaged above proved to be somewhat confusing especially in relation to the question of locating community service in the sentencing tariff (Young 1979:116-117).

The proposal to stiffen probation by the imposition of an additional obligation to perform reparative work in the community presents as a somewhat contradictory idea where the sentencing aims of punishment and rehabilitation compete for primacy. However, this

proposal was to find its way eventually into the statute books in the form of Combination Orders introduced in England and Wales when political sentiment had shifted in favour of the desert based approach to sentencing (Section 6 Criminal Justice Act 1991).

The sentencing of offenders to perform part-time work in the community was described as the most ambitious proposal in the report. The deep-rooted tradition of voluntary work in the community provided both a rationale and operating procedure upon which might be grafted the concept of community service by convicted criminal offenders. Such work, if it was not done by unpaid voluntary labour, it was suggested, would never be done at all. In particular such works as helping the elderly, the incapacitated, repairing community buildings and amenities did not prejudice the positions of paid employees and accordingly it was anticipated this would not cause difficulties with the labour market or the Trade Union movement, should such unpaid labour act as a displacement for paid labour.

Submissions were also received by a number of voluntary bodies who encouraged the idea of allowing offenders to work alongside voluntary workers in well-established existing Social Services such as Youth Clubs and Meals-On-Wheels. The encouragement from the voluntary sector in promoting community service by offenders must be seen as an important influence upon the Committee in bringing forward this novel proposal. Not only was the template of community service already well established by the voluntary movement, but their willingness to actively accept offenders into their voluntary schemes and the positive outlook they brought to bear upon such approach cannot be underestimated (Home Office 1966).

It is not without significance that the Wootton Committee highlighted the role of the voluntary services available in England and Wales immediately following their recommendation. It suggested "… that in appropriate cases, offenders should be required to engage in some form of part-time service in the community" (Home Office 1970: par. 35) when they asserted "voluntary service has deep roots in the social life of the community" (Home Office 1970: par. 31). Throughout the report the Wootton Committee referred to the voluntary sector to accommodate offenders within their ranks. Moreover, the operationalization of community service orders as envisaged by the Wootton Committee was essentially predicated upon harnessing the infrastructure, practice and ideology of the voluntary sector as it stood in the early 1970s. The function and

character of the voluntary sector in England and Wales was transformed by the advent of the welfare state, which transformation commenced in the late 1940s. Services which hitherto were in part provided by both church and lay volunteers, motivated by a spirit of philanthropy in the areas of health and education, were displaced by professional state paid service providers (Crossman 1973: 266). Increasingly the voluntary sector realigned its position and its relationship with the state sector by identifying gaps in the provision of those services and in identifying newly emerging needs which were not considered appropriate within the broad thrust of the welfare state function (Beveridge1948: 266-302).

Indeed Lady Wootton recognised that the idea of voluntary service had come into fresh prominence with the emergence of such organisations (Home Office 1970:par 32).

The most appealing features of community service for the Wootton Committee were the opportunity for offenders to engage in constructive activity by personal service to the community and the possibility which this might afford by way of changed outlook by the offender (Pease 1980; Home Office 1970).

In light of the recommendations of the Advisory Council on the Penal System (Wootton Report), the Home Office Working Group was established to report on the practical issues raised by a scheme of community service by offenders and what form of statutory arrangement would be best suited to give effect to it (Home Office Working Group 1971). In considering the proposals of the Wootton Committee the Working Group had to address certain practical matters such as the administrative aspects of any new scheme of penalty unrelated to the processing and containment of prisoners and the collection of fines. They endorsed the Probation Service as the most appropriate agency to administer the scheme as recommended by the Wootton Committee.

The Group specifically recommended that community service was such a new and undeveloped concept, it should be presented in legislation as a stand alone order and should not be combined with any other dispositions such as a fine or a probation order (Pease 1980).

They recommended a court should first have to consider a social enquiry report before it could make a community service order. This latter proposal firmly establishes the inter-dependent relationship between the Courts and the Probation Service in the making and execution of community service orders. Additionally, the community service order, they recommended, should only be imposed after the accused has consented to such an order. Perhaps the most significant point of departure from the recommendation of the Wootton Committee Report was the specific recommendation that offenders should only be eligible for community service if they were convicted for an offence punishable by imprisonment (Pease and McWilliams 1980). This limiting recommendation refocused the community service penalty as a device which could more clearly function as a genuine alternative to imprisonment, although the use of the term, imprisonable offence, did not, of itself, sufficiently confine the exclusive use of community service to cases where imprisonment would be the most probable alternative.

D. THE LEGISLATION

As expected the Criminal Justice Bill of 1971, which gave effect to the proposals for community service, was well supported with speakers from both sides expressing a degree of optimism that at last a penalty would be available that would allow certain offenders, particularly minor offenders, to avoid imprisonment. The Home Secretary employing political rhetoric (Young 1979) spoke thus:

> Those who need not be sent to prison, those who are not guilty of violent crimes should be punished in other ways in the interest of relieving the strain on the Prison Service and in the interest of the community. We propose a number of new ideas, some of them experimental, which will, I hope, be fruitful in the long run. The first is community service. I was attracted from the start to the idea that people who have committed minor offences would be better occupied doing a service to their fellow citizens than sitting alongside others in a crowded jail.(H.C. Deb.vol.826 col.972).

The Bill was essentially structured upon the recommendations of the Working Group. However, the period of hours which a Court could impose was increased from 120 hours as recommended to 240 hours with the minimum period being fixed at 40 hours. The period within which community service of any length was to be completed was fixed at twelve months, although a court could on application to it extend such period. The issue of fixing the maximum number of hours for community service at 240 hours was a particular matter which did give rise to some debate. The Government Bill doubled the maximum period of 120 hours recommended by the Working Group to 240 hours perhaps anticipating a rather lukewarm reception from the Judiciary and Magistracy. If the maximum period fixed by law was too restrictive the Home Office 'felt that if the Courts were to be encouraged to use this as an alternative to short custodial sentences, a maximum of 120 hours was too little and the Courts would be more likely to look on it as an alternative to the custodial sentence if they could order fairly substantial hours of work to be done' (H.C.Debates, Standing Committee G.8/2/72:col.473).

In the Debates, the offenders perspective on the attenuated nature of a community service order at 240 hours was anticipated as a negative feature which would militate against compliance over a period (Fraser, H.C.Debates,838:co.1964). A community service order of 240 hours for an offender who is in full-time employment could take in excess of six months to complete with the offender attending for community service each Saturday.

In the House of Lords, Baroness Wootton proposed a significant amendment to the Bill which placed an obligation upon the court to explain to the offender what community service entailed and what was expected of the offender in carrying out community service. Moreover the court would be further obliged to explain that if the order was not complied with the procedure of breach could be invoked against the offender either by way of a fine or by the substitution of another penalty and that the court had the power to review the order at the request of the probation officer or the offender. The amendment, which was carried, invested the community service order with certain aspects of informed consent. The offender in receiving this prior information from the court was further enabled to refuse consent to the community service order if that was his/her wish. Conversely upon being informed what exactly was required of him in the performance of community

service, the offender might not only be regarded as giving his formal consent but might also be viewed as participating in a communication in the passing of sentence (Duff 2000). In this perspective the offender is transformed from the role of passive recipient of a penalty such as a fine or imprisonment to the role of active participation in the courts sentence of him.

The Bill followed closely the recommendation that the consent of the offender would be required before an order of community service could be imposed. Defendants in criminal trials do not have the option to abstain from the process and accordingly may not be viewed as willing participants. Generally, convicted defendants, except for those rare cases where the convicted person feels the need for atonement for the wrongful acts done by him, are not willing participants in their penalty. At best the convicted offender merely accepts passively the penalty whether by way of custodial sentence, probation or the payment of a fine. The requirement of consent of the convicted offender to perform community service can be criticised as lacking authenticity because it is coerced. Young has described this as "confused thinking" (1979:28). He states "coercion does not arise merely because the alternative is less attractive" (Ibid.:28). He identifies three reasons for the requirement of consent by the offender as a condition precedent to the performance of community service. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the International Labour Office Convention for the Suppression of Forced or Compulsory Labour (1926) both prohibit the imposition of compulsory unpaid work outside an institution. A community service order without consent would contravene the British State's obligations under these Conventions to which it was a signatory. A second practical consideration reflects the unwillingness of some offenders to engage in community service. Sometimes offenders frankly declare to the probation officer when preparing the Social Enquiry Report that they do not wish to do the community service for reasons which may be related to a desire to prosecute an immediate appeal against conviction or in anticipation of a custodial sentence in relation to another unrelated case. These offenders are usually considered unlikely to prove compliant with a community service order and would perform community service, if done at all, to a very poor standard (Young 1979:28).

As community service schemes were to be located in the milieu of volunteer activity, the acceptability of offenders by voluntary agencies into such activities would be totally incongruent without a declared willingness on the part of offenders in advance. The legislation provided that before a Court can make a community service order it was necessary for the court to request a report on the offender's circumstances and must be satisfied from such a report that the offender is a suitable person for such work and that work is available for the offender to perform. To be eligible for community service an offender had to be over seventeen years of age. The offender had to attend for community service work when instructed and may not necessarily choose the times at which the work is done although the Probation Service would likely structure the hours of attendance so as to facilitate the most expedient performance of the order without interfering with the employment of the offender, or his educational or religious activities.

The penalty of community service was introduced into England and Wales on 1st January, 1973 under the Criminal Justice Act 1972. This legislation was largely consolidated under the Powers of Criminal Courts Act 1973 Sections 14-17 as amended by Schedule 12 of the Criminal Law Amendment Act 1977.[16] The rapid implementation into law of the most

16 The Criminal Justice Act 1972 which introduced community service orders in England and Wales provides: Section 15

1) Where a person who has attained the age of seventeen is convicted of an offence punishable with imprisonment, the court by or before which he is convicted may, instead of dealing with him in any other way (but subject to subsection (2) of this section), make an order (in this Act referred to as "a community service order") requiring him to perform unpaid work in accordance with the subsequent provisions of this Act for such number of hours (being in the aggregate not less than forty nor more than two hundred and forty) as may be specified in the order.

2) A court shall not make a community service order in respect of any offender unless the offender consents and the court –

   (a) has been notified by the Secretary of State that arrangements exist for persons who reside in the petty sessions area in which the offender resides or will reside to perform work under such orders; and

   (b) is satisfied –

      (i) after considering a report by a probation officer about the offender and his circumstances and, if the court thinks it necessary, hearing a probation officer, that the offender is a suitable person to perform work under such an order; and

      (ii) that provision can be made under the arrangements for him to do so.

Section 16 provides:

radical proposal by the Wootton Committee is testimony to the wide-spread acceptability of the measure combined with an unquestioning optimism which may in fact have reflected the spirit of the age as well as a sense of desperation with the intractable problem of crime and what to do about it. This new measure was introduced on the cusp of significant changes where the understanding of crime as a solvable problem in the period of penal welfarism (Garland 2001) was substituted by the advent of the ascendant view that the problem of crime was not solvable and would endure as a normative feature of late modern society (Garland 2001; Kilcommins, 2002).

E. THE PHILOSOPHY OF COMMUNITY SERVICE

The appeal of community service to adherents of different varieties of penal philosophies was stated thus by the Wootton Committee:

> To some, it would be simply a more constructive and cheaper alternative to shorter sentences of imprisonment; by others it would be seen as introducing into the penal system a new dimension with an emphasis on reparation to the community; others again would regard it as a means of giving effect to the old adage that the punishment should fit the crime; while still others would stress the value of bringing offenders into close touch with those members of the community who are most in need of help and support. (Ibid.:para. 33)

This multi-adaptable penalty had, it is claimed, the ability to meet the sentencers requirements of punishment, reparation, reintegration and rehabilitation all at once if necessary or in varying degrees depending on the offender or the offence. This chameleon-like aspect of community service (Hood 1974) would become a cause of

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Section 16

1) An Offender in respect of whom a community service order is in force shall-

   (a) report to the relevant officer and subsequently from time to time notify him of any change of address; and

   (b) perform for the number of hours specified in the order such work at such times as he may be instructed by the relevant officer.

2) Subject to section 18 of this Act, the work required to be performed under a community service order shall be performed during the period of twelve months beginning with the date of the order.

significant debate in subsequent studies and commentaries (McIvor 1992; Hood 1974; Bottoms 1984; Pease 1975, 1977, 1980; Young 1979). The competing sentencing rationales of punishment, rehabilitation, reparation and deterrents lie uneasily in the penalty of community service especially where the Wootton Committee expressed the hope that those required to perform community service would see their participation as a vehicle for change in outlook rather than as a wholly negative or punitive experience. The conflicting sentencing rationales of community service emerged as a central area of enquiry in the years following the introduction of community service, yielding interesting views among offenders as to the purpose of community service, either as punishment or as an agent of behavioural change (McIvor 1992:93-94).

Some years after the introduction of community service under the Criminal Justice Act of 1972 Baroness Wootton reflected upon the criticism that community service orders lacked any consistent underlying philosophy and concluded: 'and even if in the end the CSO, as judged by this standard proves no more successful than imprisonment, at least it can claim both to be cheaper and have some productive result to its credit' (Wootton 1977:111).

But perhaps the reference that 'fashions in sentencing come and go and it will largely be the recommendations of probation officers which determine whether the rising popularity of community service is just a flash in the pan, or whether this new sentence becomes a powerful and lasting addition to our armoury', (Wootton 1977:112) may prove more revelatory of the Wootton Committee's original state of knowledge and sense of direction when grappling with this innovatory penalty in 1970. The clear understanding that the sanction might be introduced on an experimental basis and then evaluated before any further decision might be made to expand the scheme nation-wide, speaks also of the Wootton Committee's sense of caution in making this radical recommendation.

The sub-Committee was faced with a dilemma, perhaps of its own making, when it set itself the task of giving adequate answers to all of the sentencing demands. In bringing forward the idea of community service the Wootton Committee believed it had a proposal

which would answer the quite often conflicting rationales of sentencing and modalities of sentencing practice. It must equally be recognised that sentencing demands are not static but shift sometimes gradually over time depending on social, economic and political exigencies and at other times shift quite dynamically especially during periods of rapid social and economic change. In particular the rise in the crime-rate, despite the anticipated moderation, if not decline, in crime expected from the application of the welfare state programmes to the perceived causes of crime gave rise to a public fear, not unaided by the media and in particular the popular press (Cohen 1959), that sentencing was losing its deterrent effect and society was less well protected (Young 1979:4-5).

This public perception of the misapplication of sentencing further eroded confidence in existing non-custodial measures and presented an opportunity to introduce a new measure with a higher element of tariff of sentence to be performed in the community and for the benefit of the community, but a sentence notwithstanding, more demanding of the convicted offender than heretofore.

The addition of the element of bite in the sentence empowered the legislators to introduce the necessary legislation with a fair political wind behind them and with minimal rancour. By presenting the new sanction in this way, the politicians, charged with enacting legislation, reflected public acceptance or rejection of such proposals (Cohen 1973:90).

Before discussing in detail the philosophical bases of the sentence of community service it is worth reflecting upon Young's instruction not to confuse the aims of the sentence with its function:

> In discussing the penal philosophy of a sentence, a distinction must be drawn at the outset between the purposes for which a Court imposes a sentence and the way in which the sentence is construed by the offender. It is often argued or assumed that any sentence that is experienced as unpleasant by an individual upon whom it is

> imposed, must be described as punishment, whatever its stated objective; that the definition of a punishment resides in the result not the motive. This is to confuse the aims of the sentence with its function. Punishment is something which is inflicted on an individual with the aim that it will be experienced as unpleasant. A sentence can have the aim of rehabilitation but also serve the function in some cases of punishing; or vice-versa. That does not invalidate its description as a measure with rehabilitative or punitive philosophy. It is only relevant – indeed, it only makes sense – to discuss the philosophical basis of a sentence in terms of the aims for which it is imposed. (Young 1979:34).

(i) REPARATION

Among the many sentencing values to be satisfied by the community service order, the Wootton Committee considered the performance of community service would "… be seen as introducing into the penal system a new dimension with an emphasis on reparation to the community" (Ibid.: par 33). Rarely, if ever, is a community service scheme so arranged to allow the offender to make direct recompense to the victim of his/her crime. When speaking on this issue in parliament Mr Silkin suggested it would be one thing for an offender to make reparation to an old lady from whom he has stolen money; it is quite a different matter to clean a canal or work in a home for the mentally handicapped in order to reimburse society in general (H.C. Debates, Standing Committee, G,/2/72:cols.5-3). Perhaps the claim to reparation was anticipating the advent of Restorative Justice, ideas which originated in New Zealand in the 1990s where restitution is facilitated by a trained person to allow closure on a crime done by an offender. However, the attempt at equivalence in making reparation to society as a whole or indeed to the community in which a victim may be living on the one hand and the individual victim on the other cannot be reconciled and must remain a form of symbolic reparation where the victim may never experience the annulment of the wrongful act done to him/her (Young 1979:36).

Pease's characterisation of the offender as a debtor to society and one whose relationship to society is restored when the debt is repaid casts the offence and penalty in quasi-commercial terms, capable of being cancelled out almost in terms of accounting and double-entry (Pease 1981; Kneale1976).

The difficulty with the analogy of payment and repayment chiefly arises in any attempt to convert moral turpitude into normal civilised acts. Society is an "abstract entity" which cannot be recompensed (Young 1979) in any true sense and reparation of such a vague nature must be seen in a much more retributive light than anything which approximates to reparation.

Notwithstanding the sceptical view of Young, a specific feature of reparation and an essential element of rehabilitation were discussed in his study. The desire of offenders to make amends if, not exactly in kind, was identified by some of those administering such schemes as an internal dynamic of those offenders who were best suited to community service and who probably benefit most by such participation. Community service presented an opportunity, previously denied to an offender, to allow the expiation of genuine guilt (Winfield 1977). Additionally compulsive offenders are afforded an occasion to take absolution for real or imagined guilt in the performance of community service which occasion might not have presented by the imposition of imprisonment or a fine. This interesting but speculative aspect of community service orders is reported by the Nottinghamshire Probation and After Care Service in 1975. The experience of the latter service was utilised by the Irish Probation Service prior to the launching of community service orders in Ireland, an interesting example of cross-fertilisation between agencies in different jurisdictions (Jennings 1990).

Measures to provide State compensation for victims of crime were discussed as early as 1957 (Fry 1957) leading eventually to fully funded State schemes for compensation for criminal injuries. In addition to State-funded schemes of compensation for victims, the idea that the offender should make direct recompense to the victim gained acceptance and

this was provided for in sections 1 and 6 of the Criminal Justice Act 1972 to allow for payment for personal injuries caused to victims as a result of crimes and for loss as a result of theft.

While the traditional role of the victim, presenting as the chief witness for the prosecution, remained unaltered in the trial of offenders' guilt, the victim received a new status in the sentencing part of the trial, where the victims needs and losses were now considered alongside those of the convicted offender. The victims' avenues of redress were extended for the first time from the Civil Courts to include the Criminal Courts. Following a Report of the Advisory Council on the Penal System specifically tasked to consider how the principle of personal reparation might be given a more prominent place in the penal system (Home Office 1970a), the sub-Committee under Lord Widgery recommended that the criminal courts be allowed to order compensation in favour of the victim of crime, which proposal was carried forward under the Criminal Justice Act 1972.

Although the position of the victim was undoubtedly advanced by this legislative change which allowed courts to award compensation to victims, their position was still peripheral within criminal justice discourse. Whatever initiatives that were brought forward concerning victims, such measures were primarily motivated by penological rather than victimological concerns where reparation by the "undisciplined hooligan" to pay back society for their wrong-doing had a greater focus than the specific needs of particular victims (Kilcommins 2002:392).

But the ideology of reparation was not new. The practice in Borstals to provide voluntary services to the local community, whether during the urgency of the great floods of 1957 in rescuing farm stock and helping in flood relief works, or in the calmer atmosphere of everyday life, where Borstal boys attended regularly at a Polio training club on Sunday mornings, at an old folks home at weekends, at a Darby and Joan Club on Saturday afternoons and at Spastic swimming lessons on Friday nights (Home Office 1967:CMND.3408, 17) presaged the deliberations of the Wootton committee with the idea

that convicted wrongdoers could be usefully engaged in acts of reparation, which acts were both useful to the community and reparative of it while simultaneously reparative of the character of the offender (Kilcommins 2002:239).

Reparation as a penological aim enjoyed prominence in social and political discourse during the period. Cohen reports in the mid-1960s that reparation was the dominant response of those questioned on how best to punish the criminal activities of the Mods and the Rockers where the respondents preferred the fixing of broken windows and sweeping the streets in the context of those particular times (Cohen 1973: 90).

In the political sphere Mr Quintin Hogg argued that reparation should be "viewed as one of the principal motives underlying our treatment of serious offences" (Hansard, House of Commons Parliamentary Debates 1967: 745, 1686-1687).

As the idea of reparation enjoyed such a prominent position in the thinking of policy makers in the 1960s and early 1970s it is not surprising that support for reparative and community based approaches to sentencing would find positive endorsement in the deliberations and recommendations of the Wootton Committee report in 1970. Moreover the rapid implementation of the recommendations and in particular the recommendation to bring forward the penalty of community service under the Criminal Justice Act of 1972 was widely accepted and endorsed politically and in the media.

The advancement of reparation as a rationale for the introduction of community service must also be seen in light of the role of the voluntary movement which was extensive in Britain in 1960s. As previously noted, the Wootton Committee critically regarded the harnessing of this social asset in the operationalisation of the new sanction.

(ii) PUNISHMENT

Reference has already been made to the dissatisfaction expressed among sentencers with extant non-custodial sentences. The fine on the one hand was deemed inappropriate due to either the ability of the offender to pay the fine without undue financial hardship or the inability of the offender to pay the fine which might ultimately be paid by his/her parents. The use of probation as a non-custodial measure was increasingly called into question. The punitive element of the community service order promised partial deprivation of liberty for the period of time the offender was required to attend at the community service scheme. This "fine on time" (Pease 1981:3) was regarded as a deprivation of leisure-time only and was not to interfere with employment, education or training. Moreover the strict requirement to attend at the community service scheme on appointed days and on time put the onus on offenders to take control of their lifestyle to meet the requirements of the community service order. Unacceptable absences from the scheme would, according to certain standards, lead to breaches and the application of either a financial sanction of fine for non-compliance or a revocation of the community service order with the distinct possibility of a custodial sentence. These latter mechanisms point to the disciplining and conditioning elements of a punitive sanction.

Leisure-time is a relatively recent normative feature of modern social and economic life. The 44-hour working week became standard in Britain in the period 1946-1949 (Roche 1988), and this was succeeded by a reduction to a 5-day week in Britain between 1949 and 1965. (Roche and Redmond 1994:18, Roche 1988:140-141). Although the opportunity for greater leisure grew increasingly in the late 1960s, Radzinowicz and King had pointed out "leisure is still a highly valued commodity, a time for freedom. As an alternative to the complete deprivation of freedom implicit in imprisonment, the partial deprivation of leisure seems a good compromise" (Radzinowicz and King 1977:302).

Community service orders, while they may in some cases be demanding, are not intended to be punitive in the sense of degrading or unpleasant. However, some concern has been

raised by the use of larger offender-only schemes. The Wootton Committee cautioned against community service schemes consisting entirely of offender-only groups by stating:

> While we do not rule out entirely the performance of community service by groups consisting solely of offenders ... we would regard it as a mistake if this became the normal style of the new proposal; for this would, in our view, be likely to give the whole Scheme a punitive flavour, and would cut off offenders both from the more constructive and imaginative activities, and from the wholesome influence of those who choose voluntarily to engage in these tasks. (Home Office 1970: para 35)

The community service order was never intended to re-introduce penal servitude in the community or any semblance of a chain-gang type system of punishment. The possibility may arise in operating large offender-only type schemes that additional punitive elements may become attached to the community service order which were never intended by the court. These unintended punitive elements might be identified in the operation of some schemes where identification and shaming of the offender in the performance of community service becomes a regular by-product of the order. Moreover the calibration of hours to be worked on a community service scheme may be over-burdensome especially if the maximum penalty of 240 hours is imposed for a relatively trivial, although imprisonable offence.

(iii) REHABILITATION/REINTEGRATION INTO THE COMMUNITY

Among the many speculated benefits of community service the Wootton Committee regarded "the wholesome influence of those who choose voluntarily to engage in these tasks" (Ibid.:par.3.5), as conducive to changing behaviour on the part of offenders, provided they were matched appropriately to such schemes. The scheme would rely substantially on voluntary community service agencies (Ibid.:par.3.6) thereby providing a constant example of selfless giving by volunteers to the community. Clearly it was hoped

that by inserting offenders into such groups the volunteers might act as mentors of good behaviour to offenders. The idea of offenders working anonymously beside volunteers for the benefit of the less fortunate in society was totally in keeping with the reintegrative perspective of community service (Winfield, 1977:128). From this perspective, the offender is perceived as belonging to the community and is seen to work with others for the benefit of the community, where previously such offender, if given a term of imprisonment, was seen to be excluded from the community.

Kilcommins has identified a remarkable growth in voluntarism in the late 1950s and 1960s in Britain. This voluntary boom was coterminous with the abolition of National Service and the emergent youth culture in Britain. Community service schemes of a voluntary nature were organised by such groups such as Task Force and Community Service Volunteers (Dickson 1976). As he noted:

> Moreover, the idealism underpinning the introduction of the community service orders is in many respects similar to the idealism which governed the establishment of organisations such as Task Force and CSV. What was appealing about a community service order is that it would provide offenders with the opportunity to participate in society by the performance of constructive tasks in the community. It would also enable them, through close personal contact with the volunteers and with members of society most in need of help and support, to alter their outlooks and develop a sense of social responsibility. (As quoted in Kilcommins 2002:380-381).

Smith challenges this somewhat neat confluence between work in the voluntary sector and community service orders where he argued:

> Organised voluntary service is a largely middle-class concept in our society. It depends on a surplus of leisure, a normative framework which rewards service with heightened prestige or respect, and generally at least a small capacity to bear some incidental, if minor expenses. It is not too cynical to suggest that no-one gives anything for nothing; volunteers need rewards as much as paid workers, though these may well not be expressed in monetary terms. … In practice it has to be admitted, the offender placed on a community service order is unlikely to see his service quite as positively as would a volunteer. His participation will be voluntary only in a sense that, as with a probation order, his consent in court will be required (and usually given for fear of a less attractive sentence). … Indeed, it would be easy to see the work demanded under a community service order as little more than forced labour, and it is wise to remember that it may well be so perceived by many of those sentenced (Smith 1974:248).

The voluntary movement which over the past thirty years appears to have gone into decline must be understood in the context of its time. The idea of grafting a criminal sanction onto the altruistic voluntary movements in the early 1970s might not readily suggest themselves today as a positive solution to the problem of devising penalties for offenders. In the short few decades since 1970 public, political and legal sentiment has shifted into a more punitive mode where issues of risk and desert play a more prominent role.

The extent to which this reintegrative perspective endures, as offenders are increasingly separated from the influence of volunteers, is clearly a defining issue for community service. If the integrated perspective is singularly predicated upon the joint participation of volunteers and offenders, the absence of such an influential joint enterprise calls forth an increasingly punitive perspective and the role of community service merely as a theatre for retribution.

The therapeutic role of community service is seen in the literature as subordinate to its primary punitive function and is at times confused. The origins of this confusion can be traced to the Wootton Committee recommendation that community service orders should be administered by the Probation Service, an agency within the criminal justice system, which was by tradition and training firmly rooted in a world view which saw the offender as a person in need of care and assistance rather than deserving of punishment. The role of the Probation Service in this regard will be discussed later, but for the purposes of the present discussion the resistance by the Probation Service to the transformation of at least part of their functions as penal agents must be recognised (Nellis 2004). Probation officers have traditionally tried to "advise, assist and befriend" the offender on a probation order by identifying the offender's needs and emphasising his strengths as a route to rehabilitation. The criteria by which such professional intervention by the probation officer might be measured would certainly include any perceptible change in either the attitude, lifestyle or behaviour of the offender at the end of the probationary process. In stark terms, if the intervention does not bring about sufficient change in the offender's behaviour such intervention might be considered a failure. However, a change in behaviour on the part of the offender on completion of a community service order would

not be measured by the same criteria. Pease (1981) regarded any rehabilitated result as "a bonus" on completion of a community service order. When community service was introduced into Ireland under the Criminal Justice (Community Service) Act 1983, the specific provision that community service could only be substituted for a custodial sentence, intended to be imposed by the court, emphasised the punitive rather than the rehabilitative character of the penalty.

The competing sentencing perspectives of the Probation Service on the one hand, which saw its role as caring and interventionist and that of the sentencing Courts on the other hand, which regarded community service as a deserving punishment, were identified and reported early in the implementation of community service schemes. The Home Office Research Study on Community Service Orders (Pease *et al* 1975) recognised this interdependent relationship between the Courts and the Probation Service where the courts provide the clientele for community service schemes and the Probation Service provide the recommendations about offenders' suitability to perform community service. But this interdependent relationship was built upon essentially incompatible sentencing perspectives as the Report points out:

> As probation officers may be expected to focus mainly on treatment, and sentencers often on punishment, the Probation officer who organises community service has a difficult task. He has to develop not only a 'therapeutic' scheme which his probation officer colleagues can approve, but also one which sentencers will consider a realistic alternative to prison, (Pease *et al* 1975:5)

The dilemma is put succinctly by Knapman (1974) (Pease *et al*:1971):

> … The experience thus far has showed that there is little harmony between the sentencers and those who have to implement community service orders. It seems

essential to resolve these issues if the future of community service is to be of use to courts and satisfying to the Probation Service.

In assessing an offender for suitability for community service, the probation officer might now ask, where previously the question would never have arisen – what can you do to help rather than what are your problems? (Pease *et al* 1975), thereby recognising the shift in function of the probation officer in supervising the convicted person.

The therapeutic function of community service emerges perhaps indirectly in the performance of the community service order when the client is best matched to a particular community service scheme (Pease 1981:6). Without denying the disciplinary aspect of community service which requires the offender to conform to the dictates of punctuality, consistency and the controlling supervision of the community service organiser, the provision of such activity for certain offenders can provide some element of socialisation, especially for socially isolated offenders (Winfield 1977). Community service emphasises what the offender may contribute while on community service rather than what he may receive on traditional probation. This "ability orientated rather than problem orientated approach" (Young 1979:40) may act as a spur to the offender's self-image and esteem and further contribute to his reintegration in the community. By recasting the offender in the role of self-autonomous agent in contrast with the role of passive recipient of help, West suggests the community service order allows the offender to find "an alternative and legitimate source of achievement and status (West1976:74).

Young (1979) examined a number of specific hypotheses about the rehabilitative potential of community service. The use of qualitative methodology allowed him to test these hypotheses in interviews with central actors in the community service schemes.

Young considered the claim that community service fosters greater social responsibility. By placing the offender in schemes which would expose him to the difficulties

encountered by others less-fortunate, it was assumed that this would affect a more empathic attitude on the part of the offender. A series of suggestions are quoted from social enquiry reports to suggest community service might help the offender to increase self-confidence and self-respect which the offender lacks at the present time. In contrast with probation orders which ensure privacy between the probation officer and the offender the community service order is performed in "full view" of the community thereby placing an obligation upon the offender "to behave in a responsible and socially acceptable manner". Cohen posited the idea of punishment in the community as an extension of the prison system when he identified the phenomenon of the dispersal of discipline using the idea of transformations from Foucault (1975:303). He suggests that the use of punishment in the community only resulted in:

> … gradual expansion and intensification of the system; a dispersal of its mechanisms from more closed to more open sites and a consequent increase in the invisibility of social control and the degree of its penetration into the social body (Cohen 1985: 87).

Cohen's sceptical view of community based sanctions contrasts sharply with the affirmative presentation of what might be possible and salutary if offenders worked alongside volunteers to the benefit of those less well off in the community as identified by Wootton.

The latter view of community, this place where offenders might repay their debt to society, has no negative connotations. However, this benign view of social organisation reaching its apogee in the idea of community, cannot easily withstand the challenge that there are many towns, villages and housing estates where the prevalence of drug-taking, public disorder, drunkenness and violence is so pervasive that the community is incapable of providing the setting for reparation as the community itself may be a significant contributing factor to the offender's criminal behaviour.

Young challenges the uncritical acceptance by many of the ideology of community.

"Community is not a unitary concept" he claims (1979:42), but includes even those who would see themselves occasionally belonging to groups, whether defined ethnically or by some other political criterion as quite apart from, and sometimes in opposition to, mainstream social categories. These issues are compounded in multiethnic societies.

Another rehabilitative component considered was the constructive use of leisure time.

Boredom, especially among young offenders, was considered a key contributing factor in offending behaviour. The provision of community service could be considered an opportunity to disrupt these periods of boredom and inactivity for certain offenders although Young also suggests that such use of community service could be considered as incapacitation rather than rehabilitation. Field probation officers reported to him in his studies that such use of community service may equally serve as an outlet for energies and abilities thereby reducing the motivation to commit a crime.

Sometimes the experience of an offender on community service schemes, especially schemes which offer interpersonal assistance, may provide an opportunity for the offender to identify with the aims of such a scheme and on occasion may even engender a desire on the part of such an offender to continue on as a volunteer in such a scheme or train in a professional discipline in skills related to the project. This phenomenon of the client becoming a professional helper is not unknown in the addictions field having been identified in the American literature as "new careers" especially emerging from the anti-poverty programmes in the United States in the 1960s. Such workers are invested with a vast lived experience which professionals trained by orthodox education could rarely achieve. Young's studies of the early schemes provide evidence of the stated desire on the part of a significant number of clients to continue to be involved in the schemes on completion of court mandated hours, although those who do pursue voluntary

participation do so for a very short time (Nottinghamshire Probation and After Care Service 1975).

Young's final consideration of the rehabilitative component of community service centred around the beneficial effects of the habits of work. The experience of the Durham and Nottinghamshire Community Service Projects were used to test the influence of regular employment upon the suitability of candidates for community service orders. They showed that an erratic employment record is not necessarily a contra indication for suitability for community service; rather the community service order can be usefully employed as a device to intervene in the offenders' continuous lack of employment, although limited success can only be achieved. Young likens this type of intervention to the sheltered workshop allowing the offender to ease back into the work habit. Such interventions which break the habit of idleness may develop a sense of self-worth in offenders. The value of work is socially constructed and may differ from one society to another and may indeed dynamically change in meaning over time within a given society (Weber 1976:31). West suggests:

> Work is a measure of the value placed upon an individual in society. To be unemployed is to be useless, to be under-employed is to be under valued. (West 1976:83).

Community service schemes which are arranged around projects which may never come within the offender's lived experience such as railway preservation and other such environmental projects lacked immediacy and focus for such offenders. The personal and social relevance of the community project is essential to connect the offender to the community. Contact with other workers was also considered as a rehabilitative factor by Young (1979). The support of voluntary co-workers has already been considered, but the supportive contribution of suitable supervisors was specifically identified by Young as a key indicator for successful completion of community service. A supportive supervisor who would informally counsel an offender who may have issues relating to financial

problems or substance abuse, gained respect among community service workers for such support. Additionally, the effective supervisor was seen to act as a mediating authority figure by introducing the offender "to a more realistic attitude to his social and employment obligations" (Young 1979:45)

The original rehabilitative components of community service were not only retained but were enlarged in the implementation of the community service ideal (Young 1979). Perhaps this identification of more extensive rehabilitative components is not surprising in light of the central role played by the Probation Service in setting up such schemes and developing the sentence of community service. The continuing ethos of rendering assistance to offenders was not relinquished by the Probation Service when dealing with community service offenders and any opportunity to enhance the rehabilitative function of the community service order was encouraged. Writers such as West (1977:116-120) and Flegg *et al (1976)* emphasise the non-punitive application of community service; a view which was quite consistent with the traditional aims of probation.

The danger of overemphasising the rehabilitative aspect of community service presents a number of difficulties not least of which is the tendency of the "probationisation" of community service to occur, drawing on all of the discretionary elements of social work practice by probation officers (Pease 1981:6; Pease and McWilliams 1980:IX). The related issue of confidence by sentencers in the operation of community service orders can be seriously undermined by the overuse of discretionary practices by those operating community service schemes.

The exercise of unwarranted discretion in excusing absences from work schemes, discounting hours for travel time beyond those permitted by regulations and the like may lead to loss of confidence by sentencers in the penalty, where sentencers and probation officers are involved in a mutual relationship, albeit employing different sentencing aims and practices to achieve a desired result (Young 1979). However, the need for expediency in processing community service orders within the statutory year may hinder its full

rehabilitative potential and such discretionary practices (Jennings 1990). Besides the expediency of processing orders already mentioned, the rehabilitative aspects of community service must be considered as tangential rather than direct applications of programmatic interventions such as those developed in Cognitive Behavioural Therapy (CBT) and drug addiction treatments in mainstream probation work. Moreover, the hope expressed by the Wootton Committee that offenders would be significantly influenced by the experience of community service, however well structured and implemented, cannot be considered other than as a remote possibility of intervention in the attitudes, lifestyle and behaviours of most offenders and their capacity to re-offend (Varah1987:69). Any claim that community service is a life changing experience must be taken lightly however much those rare cases may appear to confound this view. The performance of 200 hours community service is unlikely to overthrow years of learned negative experience (N.A.P.O. 1978:18). Nevertheless, community service orders when they are imposed as a direct alternative to imprisonment, a proportion representing less than fifty per cent of all cases (Pease1975), must be viewed as less destructive of the socialising habits and abilities of offenders than the isolation and socially corrosive influence of imprisonment (Jennings1990).

COMMUNITY SERVICE AND PRAGMATISM

The emergence of community service as a penalty must be understood in the historical, political, penal, cultural and economic context of the early 1970s. Specifically, the period must be viewed in retrospect as one of unsettled social outlook and change. The orthodox view that rehabilitation of offenders required only the proper calibration of treatment was severely challenged and finally dethroned in the early 1970s (Martinson 1974). The challenge to "scientific" certainties in the social sciences, which owed much to the philosophy of positivism from an earlier period in the physical sciences, gave way to pragmatic and common sense explanations (Lonergan 1957) and solutions to seemingly intractable issues of crime and criminal behaviour (Bottoms 1979).

In Britain in the late 1960s and early 1970s there was near universal agreement that prison did not serve the purpose of deterring the convicted criminal from repeating his/her crimes. While reviews were conducted to identify new sanctions (Advisory Council on the Treatment of Offenders 1957), it was determined that any new sanction which might be identified would be subject to a rigorous scientific evaluation before it would receive approval as a sanction. This critical procedure was in large measure abandoned in favour of a more pragmatic approach when the issue of community service was discussed 13 years later. Such were the pressures on the penal system at the time, an unproven but experimental approach to a new sanction was adopted as the way forward. Community service orders were introduced in the spirit of "penological pragmatism" (Bottoms 1979) without reference to any particular penological objective.

A degree of pragmatism is evident in the Wootton Committee report where they advise the use of a penalty without firstly determining the precise penological basis for it. Moreover, unlike earlier enquiries which addressed sentencing issues, the Wootton Committee proceeded to make recommendations for the introduction of this new sanction on an experimental basis without firstly subjecting the idea to a level of scrutiny and analysis which was to be the standard measure for any new proposed sentence from 1957 onwards (Hood 1974). The approach of "do it and see what happens" speaks more of a pragmatic approach to resolving demanding social and economic issues concerning the punishment of offenders rather than proceeding upon an approach which was predicated upon a tested hypothesis where the elements of the sanction are clearly understood and retain a fixed meaning.

Indeed, the failure to identify specific penological or criminological aims in this process was soon to become manifest in the practical working out of the sentence with different and conflicting sentencing aims seeking to dominate within the relevant criminal justice agency whether in the Courts or in the Probation Service at any one time. The Courts and the Probation Service perform vastly different functions within the criminal justice system. The introduction of community service combined some aspects of these separate functions

into a relationship of mutual inter-dependency. However, the traditional functions of the sentencer and the probation officer and the interplay between these functions were to provide a focal point for the investigation for community service orders, which would expose defects in the design of community service as a penalty, defects which were directly attributable to the limitations of common sense pragmatism and political expediency.

Community service has been criticised as being "ambiguous" by Young (1979:50). It seeks to satisfy and measure-up to every sentencing requirement and is traditionally understood in the context of punishment and rehabilitation but also in the context of emerging criteria such as reparation and reintegration of the offender. (Hood :1974, Bottoms:1987). This "confused" (Pease1981:2) mix of sentencing rationales presented in this pragmatic fashion by the Wootton Committee Report contrasts sharply with the procedure adopted by the earlier Royal Commission on the Penal System, which had floundered in debating the issues of penal policy. By eschewing the requirement to elucidate and rank in priority a settled philosophy of punishment, the Wootton Committee followed Radzinowiz's advice to accept diversity in the purposes of punishment (Radzinowiz 1966:115).

In bringing the proposal for community service forward, the Wootton Committee had to navigate a course between public acceptability of the proposal, awareness of acute prison overcrowding and expenditure, the political feasibility of bringing such a measure into law and the general acceptance by sentencers to transform the new penal measure into a viable alternative non-custodial sanction. In negotiating such a difficult course or anticipating the negotiation of such a difficult course, the Wootton Committee in its deliberations were subject to varying degrees of accommodation and compromise. Ultimately, the teleological basis upon which the measure was justified was duly acknowledged by Baroness Wootton (1977:111) which reflected the pragmatic and common-sense approach but subject always to the limitations of such an approach (Lonergan 1957). As a result the objectives of the sanction remained confused.

CONCLUSION

This chapter examined the factors and influences which led to the introduction of community service in the jurisdiction of England and Wales, the jurisdiction which the writer contends was the overarching influence on the introduction of the same sanction in the Republic of Ireland. Contemporary influences from New Zealand were examined, as were other earlier experiments in other jurisdictions. While claims to the first sightings of community service might be made in respect of New Zealand, the U.S. and Germany, the first formal community service order emerges in the jurisdiction of England and Wales in 1972. More critically, the historical claims to parentage of community service are contested. Undoubtedly, the historical deployment of convicts in the performance of manual labour, and in defence of the State through impressment in the navy and army can be categorised as work related dispositions. Nevertheless, the modern penalty of community service must be seen as a discrete penalty which amounts to a denial of leisure time, a concept not easily transposed to the eighteenth century unless one was born into the wealthy aristocracy. Accordingly the finite and contained nature of the community service order cannot be easily compared to earlier work related dispositions.

Despite the enduring tendency of the institution of the prison to survive and even to grow, this phenomenon was not unaccompanied by widespread critical comment on the efficacy of such an institution and its role in the punishment and rehabilitation of offenders. Moreover, the emerging focus of sentencing to include consideration of reparation for crimes and the reintegration of the offender into society could not be advanced without the development of different forms of penalty which would allow for the practical expression of such reparation to society and reintegration in a community setting.

Disillusionment by sentencers with the traditional forms of punishment, such as fines and imprisonment and even probation, called forth a need to devise a penalty suitable for the modern era which was neither a simple "let off" by way of a fine nor too harsh a penalty by way of incarceration.

These issues were examined in this chapter with a view to placing community service as an emerging penalty in the political, economic, social and penological context and in the period during which it emerged. In particular, there emerged a growing sense of confidence that the concept of "community", a particularly difficult concept to concretize, could act as a catalyst for change in a number of areas of social life, including the rehabilitation of offenders. The identification of a vibrant voluntary social services movement combined to provide a distinct opportunity to introduce a new penalty in the early 1970s, as community service and voluntary service were seen to merge issues of social cohesion and repair. These essential factors for the introduction of community service in England and Wales at that time were analysed to elucidate the timely emergence of the sanction. And finally, the not insubstantial role of pragmatism was examined as a factor in the emergence of community service in light of economic exigencies and the projected cost of maintaining an ever-increasing prison population.

Timing, it is said, is everything in politics. The promotion of a Bill in Parliament to include the new penalty of community service (Section 15, Criminal Justice Act, 1972) allowed the introduction of the sanction, albeit on an experimental basis initially, as recommended by the Wootton Committee, at a time when public sentiment was well disposed to changes in the punishment of offenders. The emphasis on reparation by offenders, if not directly to victims, but certainly to society as a surrogate, appealed to the public, politicians and the media.

Having traced the emergence of community service through the deliberations of the Wootton Committee and parliamentary debates, community service emerges as a penalty which is claimed to satisfy all forms of sentencing objectives from the condign and punitive, through reparation for harm done to society and victims, through rehabilitation and the final reintegration of offenders back into their communities. This optimistic prescription emerges in response to the somewhat bleak outlook expressed to the Wootton Committee by sentencers on the efficacy of current sentences at that time.

Besides the opportunities presented for the introduction of community service in the early 1970s, unquestionably, the growth in the crime rate and consequent increase in the prison population had a significant impact upon official thinking and on any proposed solutions to prison overcrowding. The estimated costs of building and maintaining a growing prison system was presented as untenable. In these circumstances the opportunities and exigencies of the situation combined in a pragmatic fashion to bring forward a penalty which would not overburden the exchequer and which was generally perceived as fair and progressive.

Thus in the jurisdiction of England and Wales, we see the emergence of this new penalty of community service in the latter quarter of the 20th century. The factors influencing its emergence at that time have been discussed in this chapter as well as the legislative framework providing for its introduction. The community service order was expected to make a significant contribution to the reduction of short-term custodial sentences, thus easing prison overcrowding. The extent to which the sanction contributed to this sentencing aim will be discussed in the next chapter which deals with the operationalisation of the penalty.

CHAPTER 2

COMMUNITY SERVICE ORDERS PUTTING THE IDEA INTO PRACTICE

INTRODUCTION

In this chapter the operation of community service orders in England and Wales will be discussed in detail to explore those features of the newly devised sanction which best suited its success and also those features which, for theoretical or practical reasons, militated against its optimal implementation. The chapter initially examines the selection of the Probation Service as the agency considered best suited to implement the community service scheme. However, as a result of this selection it will be revealed how such a mediating role between the Courts and offenders on community service schemes was to have a transforming effect upon the ethos of the Probation Service and its professional orientation. The traditional discretionary practices of the probation officer are examined in light of the challenges presented in supervising an offender on community service within a punitive paradigm. The chapter then moves on to examine the claim that community service is primarily a penalty imposed as an alternative to custody and seeks to locate the tariff position of the penalty in everyday practice. A number of studies are examined to elucidate community service as an alternative to custody and its role in the reduction of recidivism and general offending behaviour.

Specific operational standards were introduced for community service orders 16 years after the scheme became established. The presence or absence of such standards is examined with particular reference to compliance issues by offenders and possible judicial perceptions of these changes. Finally, the enduring role of community service in the general scheme of penalties is discussed with particular reference to entrenched practices by sentencers and the Probation Service and how such practices may promote or negate the original sentencing objectives which were claimed for the penalty when it was first introduced.

In surveying the literature the writer will occasionally refer to contemporary sources when dealing with issues in this chapter and in chapter three. While seeking to remain faithful to chronological dictates, such references are used to show the dynamic nature of the penalty both in England and Wales and in the Republic of Ireland. Moreover, while the chapter deals with the operation of the community service order in England and Wales as a precursor to the Irish community service order, some of the views of the Irish judges will be introduced at this juncture. Such an approach is adopted to allow for a fuller discussion upon the matter in issue and to obviate the necessity of reintroducing the topic again later for separate discussion and analysis.

THE INSTRUMENTAL ROLE OF THE PROBATION SERVICE IN COMMUNITY SERVICE

The critical question of the administrative link of the voluntary agencies and the courts was recognised by the Wootton Committee when making its recommendations. Some intermediate organisation would be required to mediate between the voluntary agencies who would provide places of work for offenders and the courts who would not perform functions other than of a purely judicial nature. The necessity to interview offenders to determine suitability for community service, the identification and placement of such offenders in suitable work programmes and the supervision of offenders while on such schemes to ensure such work was satisfactorily performed could not be imposed upon the voluntary agencies themselves (Home Office 1970:para 46). Clearly a professional organisation would be required to administer the scheme in all its complexities and demands. Prior to the introduction of the scheme in England and Wales the Prison Service had some experience of supervising prisoners in a limited number of work in the community schemes. However, the primary objection in rejecting the Prison Service as the supervisory organisation concerned the use of prisons as reporting centres (Ibid.:para48). Having consulted with the management and representative associations of the Probation and After Care Service which signified their general consent to administer such schemes, the Wootton Committee favoured recommending the Probation Service as the most suited agency to administer the scheme stating:

> Some aspects of the new functions which we envisage, such as the assessment of individual offenders and their allocation to appropriate tasks would not be very remote from existing probation duties (Ibid.:para 49).

The assumption of the administration of community service schemes by the Probation Service marked a significant departure in the practices and world view of the service, which in retrospect is recognised as a primary force in moving the Probation Service into the area of corrections and away from their traditionally perceived role of social worker and needs provider (Nellis 2004:120). Albeit, the role that rehabilitation had to play in the aims of sentencing was to come under increasing criticism during the same period that community service was introduced in England and Wales (Martinson 1974), the adoption of the function of penal agent by the Probation Service in administering community service schemes did present challenges to the Probation Services particularly for the main grade probation officers with daily case loads. During the settling in period, the Service was forced to "walk a tight rope" by not precipitously rejecting the supervisory function of community service as anathema to the social worker's role (Winfield1977). Furthermore, the arrival of community service as an intermediate sentence unsettled the readily accepted array of sentencing aims, with just deserts, depending upon the seriousness of the offence, attracting the use of imprisonment at the top end of the scale and rehabilitation attracting the use of probation at the lower end of the scale.[17]

Such changes in the role of the Probation Service are best identified in the day to day operation of the community service schemes. Initially, the probation officer is engaged to provide a Social Enquiry Report on an offender. The recommendation of community service in such a report by the probation officer invests the probation officer with significant control over the offender. Probation officers who work closely with their local

17 The rehabilitative effect of a prison sentence was seen to be "not working" (Home Office 1970) especially when prisoners were accommodated in overcrowded prisons.

courts, tend to learn and anticipate the likelihood of a particular bench of Magistrates or court accepting a recommendation for community service (Young 1979:30). Equally the Courts tend to be influenced by the sentencing reports of the local Probation Service. This closed loop of influence perpetuates the acceptability of sentencing norms and recommendations between the Courts and the Probation Service (Davies 1974:30).

The recommendations in a social enquiry report present the first moment and opportunity in the exercise of discretionary judgement by the Probation Service in the overall operation of community service orders. While it is recognised that courts are not bound to follow a negative recommendation, in general a report which defines an offender as unsuitable for community service will not be ignored and an Order for community service made notwithstanding. (Pease *et al* 1975). The discretionary power of veto according to Young:

> "…lies in the fact that the availability of suitable work is partly determined by the nature of the offence and the character and circumstances of the offender. Thus an organiser can maintain that no suitable work could be found, for example, because the instability of the offender or the seriousness of his offence would present him an unjustifiable risk to the community." (1979:32).

The scheme of community service introduced in England and Wales provided that community service could be imposed in cases where the penalty of imprisonment was provided for in respect of the relevant offence. As this threshold could admit offenders who might equally receive a fine or probation, the probation officer in preparing a report would not be in a position to know in advance what the real penalty eventually might be. This presented a danger for the probation officer who had the difficult task of anticipating the penalty which might be imposed. Some probation officers reported that community service might be inappropriately promoted in social enquiry reports to sentencing courts to allow an offender to avoid the harsh penalty of imprisonment. The exercise of discretion by probation officers in this way may have the effect of moving the offender higher up the scale of punitiveness to avoid a perceived threat of even greater punitiveness (West

1977:112). As will be seen later (Chapter 3), the risk to the offender posed by this conundrum was significantly ameliorated in the community service procedures introduced in the Republic of Ireland (Foley –v- Murphy and DPP [2005] I.R.574). Briefly, the legislation and regulations obliged the District Court to specify the penalty of imprisonment when making a community service order thereby obviating the difficulty encountered by probation officers in England and Wales.

In the example given above, the exercise of discretion by the probation officer might be seen as an act of protecting the offender. The use of discretion has always been a feature of probation practice, where failed attempts at rehabilitation are not necessarily regarded as conclusive but part of the normal process where the client is urged to build upon his strengths when addressing his problems (Prochaska *et al* 1994).

In the conduct of probation work the relationship between the probation officer and the client is based upon a trust where quite often the probation officer must give encouragement to an offender to change seemingly intractable behaviours. The choice of the treatment model ,whether cognitive behavioural therapy or some other procedure, requires the absence of coercion to engender co-operation on the part of the client in the process of change. The exercise of professional discretion by the probation officer in these cases is not only permissible, it is essential.

However the nature of discretion exercised by the probation officer in the supervision of community service is markedly different. A significant constraint upon the discretionary powers of the probation officer in community service is the time-limit of twelve months for the completion of an order, especially an order comprising a maximum number of hours. In the rehabilitative context, when a client is not responding well to a treatment programme, the probation officer will apply social work skills to assist the client to achieve an insight and motivation to address the issues causing greatest difficulty for the client. In this situation the field probation officer must wait a considerable time to validate his/her diagnostic decisions before exercising discretion one way or the other. The use of

discretion by probation officers and community service officers in assisting offenders to complete community service has been found to be a key element in the successful completion of such orders (McIvor 1992; Young 1979). The discretionary procedures used by the Probation Service to promote compliance with community service closely reflect the methods of traditional social work, but the finite temporal aspect of the community service order combined with the usually unambiguous nature of the work to be performed tend to change the character of that discretion. Instead of the client-orientated perspective of the social worker a newer and more externally demanding task-oriented perspective is called forth in the practice of the probation officer. This new perspective is inspired more by the requirements of compliance and control. In this regard West observes:

> … that probation orders contain requirements for certain activities (reporting, notifying change of address), but these do not per se define the content of the order as does community service work. If the offender does not work, there is no rationale for the order to continue. (West 1977:117)

The opportunity to engage in community service which might influence the offender to change his/her behaviour, which the Wootton Committee so clearly emphasised, is frustrated by non-compliance on the part of the offender if he simply fails to turn up for community service. From the offender's perspective the experience of probation supervision in the past may lead to an expectation on his part, that a similar discretionary approach may be used by the probation officer with regard to community service orders (McWilliams and Murphy 1980). On the other hand if judicial and public confidence is to be maintained in the sanction, the ability to extract work as required by the order must be consistently demonstrated. Phipps puts it thus:

> Breach proceedings against an offender who persistently fails to comply with the conditions of a community service order are inevitable. This is the reality of an order which specifies the number of hours "unpaid work" which must be performed

> within one year. The inevitability of such proceedings is a fact which is foreign to both probation officers and to many of their clients, who, in the past have respectively either threatened, or have been subject to threat of, borstal or detention centre recall etc – a threat more often than not specifying nothing. The community service order offers no room for *laissez-faire*. (Phipps 1975:.88).

Had the community service order in England and Wales been introduced expressly as an alternative to custody, its penal content might not have been relegated to the background (Young 1979:139); nor would it have had to compete for primacy with other sentencing demands. This might have removed some of the ambivalent features of the sentence. The role of the Probation Service in administering the sanction within such a punitive paradigm, while clearly challenging their traditional professional perspective, might have rendered their function, ultimately, less ambiguous.

Arguably, when community service is understood primarily as a punitive measure (West 1977:117) the exercise of discretion by those who supervise community service requires the adoption of procedures which may be anathema to their traditional social work practices and training (Parsloe 1976; Halton 1992). Every interpersonal endeavour requires a degree of mutual consideration and negotiation. The interpersonal dynamics in the relationship between a marginally willing offender to perform community service and a probation officer are likely to lead in any direction without clearly expressed procedures and expectations. Baroness Wootton's amendment to the Bill in the House of Lords, which requires the Court to give prior detail to the offender as to the nature and requirements of community service, can only be interpreted as giving a formal expression to the consensual nature of the penalty. The offender is more likely to respond to clearly stated rules and procedures such as warning letters in cases of failure to turn up for work if the limits of the probation officer's discretion are known and communicated clearly to him/her in advance. Notwithstanding the socially desirable features of community service as described in the Wootton Report such as rehabilitation and reparation, which aims have always been the primary focus of the Probation and After-care Service, the adoption of the supervisory function of community service by the Probation Service has shifted the professional axis of

that service a number of degrees towards a justice model and away from a welfarist model of sentencing.

This repositioning of the Probation Service might have been avoided had the service declined to assume the role of penal agents in supervising community service (Nellis 2004). The function of supervision might well have been undertaken by the Prison Service but this would have clashed with the ethos of the voluntary agencies which were seen as critical to the launch and success of the scheme. The consequential debates about the limitations of social worker's discretion would not have arisen at least in the context of community service, although other influences on the social worker's modalities were soon to emerge which would challenge many of these discretionary practices (Martinson 1974). The clash of values inherent in the difference between probation and community service presented not just the only challenge to the Probation Service during this period. The search for effective programmes of rehabilitation in response to the nostrum that "nothing works" elicited a realisation that certain programmes of treatment might prove more effective if implemented in a more programmatically authentic way (Bonta 1996; Andrews *et al* 1990; McGuire 2000). The use of discretion in these emergent programmes was strictly limited to the parameters of the programme where overuse of discretion was regarded as a feature which would militate against the integrity of the programme and positive outcomes (Home Office 2000).

The advent of community service orders has significantly helped to transform the role of the probation officer from `advise, assist and befriend` the offender to that of confront, control and monitor him/her. This is also borne out by Millard and Hocking (1974) who contend that Courts institutionalise this ambivalence when requesting reports and when placing offenders on probation; the Courts are admitting that they are unsure whether an offender should be punished or should receive help. A sentence of community service contains much less ambiguity than a probation order and the expectation of compliance by the courts is clearly understood by the Probation Service. In this regard the introduction of community service clarified the relationship between the Courts and the Probation Service, the Probation Service in large measure adopting the role of penal agents of the court, a role previously reserved for the Prison Service. This new role has been

characterised by some British probation officers as "screws on wheels" (Haxby 1978:163). The maintenance of a productive personal relationship with a client may be seen as preferable to placing such relationship in jeopardy by invoking breach procedures (Hough 1995). While this tension presents a dilemma for the Probation Service it also presents a structural problem for the criminal justice system where courts make orders, the parameters and requirements of which, at least in respect of community service orders are clear and precise.

On this topic, three responses from Judges in the survey are illuminating.

Firstly, A5J1CC expressed doubt as to whether a Probation Officer would ever portray his/her client in a negative light:

> "you see its like this, the Probation Service is like everything else. It is the curate's egg. You don't know who is going to get it. You don't know whether it is going to be enforced in a realistic way or whether the work is going to be apparent. You just don't know. From reading some of the probation reports that you generally get, I mean one despairs of some of the members of the Probation Service that they don't just have their `hearts on their sleeves`, they have a wonderful glowing attitude to life…. It's all very fine to take this young man in of a Thursday and find that you have to say something positive about him. There isn't something positive to say about a lot of people. You shouldn't feel that it is your duty to invent positive". A5J1CC

This view was amplified by A8J1SC when he reflected upon the restricted information which may be available to a Probation Officer when preparing a suitability report:

> "…Defendants generally, if I could say this, I think that they speak more frankly to their lawyer than they do to other people who are more obviously pastoral in their involvement. When they are speaking to a Social Worker or a Psychologist or someone like that, they are on the stage. They want to impress that person and want to get a good report and they don't speak frankly very often

> but they do tend to speak frankly to their lawyer because they know that not doing so may lead to unfortunate crossed wires." A8J1SC.

Similarly concern was expressed at the level of discretion used by the probation officer and the consequent detachment of the offender from the Courts' authority. One Judge was exercised by the element of drift and delay which may accompany some community service orders once they are made when he stated:

> "… a lot of cases that come back before the Courts are coming back after a very protracted period of time, with the order not complied with. I would prefer to see such cases brought back as early as possible… because the seriousness of the situation can be brought home to the Defendant rather than leaving him thinking for maybe a period of 12 months that he can get away with it. That he has no one to account to or that the court has no power of authority to bring him back to deal with him…its difficult to know generally each area may be different but to be coming back after 6 or 12 months, I think its too late." A2J1DC.

In summary, the Probation Service was identified as the criminal justice agency best suited to perform the mediating role between the offender and the courts in the implementation of the community service order. Prior experience in the assessment of offenders and probation work with offenders by the Probation Service was not however sufficient to prepare these agencies, whose orientation was decidedly welfarist, for the new challenges which presented in the operationalisation of community service. In particular, the exercise of discretion by the Probation Service in both the assessment for community service and in the supervision of the offender while on a community service order, presented distinct challenges to their professional outlook. In the assessment for community service, the Probation Officer could not know what other sentence a court might give if a negative report was presented. The Probation Officer may thus seek to protect her client against a harsher penalty such as imprisonment. Similarly, once an offender is placed upon community service, the scope for discretion is seen to diminish significantly as the performance of community service becomes the only criterion upon which discretion may

turn. If the offender turns up and performs community service that is the end of the matter. If s/he does not attend without reasonable excuse breach proceedings are warranted. Thus, the element of discretion for the Probation Officer, whose professional orientation is permeated by discretionary practices, is seen to diminish in the new instrumental role which is demanded of the Probation Service in the implementation of a community service order. A certain continuity in the welfarist orientation by Irish Probation Officers was identified by some of the judges who were interviewed in this study. Such 'probationizing' practices may be seen to conflict with sentencing expectations which would otherwise require a reasonably strict compliance with a community service order.

COMMUNITY SERVICE AS AN ALTERNATIVE TO CUSTODY

The approach taken by the Wootton Committee to recommend community service as an available penalty to the courts without first testing such a penalty in advance was acknowledged frankly in the Report (Ibid.para.7). This essentially pragmatic approach has much to recommend it but also contains within it the distinct possibility that the penalty would become assimilated into the criminal justice system (Young 1979; Pease 1977) without critical reference to the precise contribution it might make to the overall reduction of the prison population or the reduction of crime. The reduction in the use of imprisonment was always regarded as a primary objective of community service. The extent to which the penalty became just another penalty without specific reference to its original purpose as an alternative to prison, has been criticised by a number of writers. Pease (1980) characterises the discourse on community service as an alternative to prison as a confused debate. He identifies the seed of such confusion in the ambiguous approach taken by the Wootton Committee in 1970 and in particular the open-ended application of community service to a number of offences, not necessarily imprisonable offences (Home Office 1970:para. 37). The proposal to introduce community service for such a wide range of criminal behaviours allowed the use of community service as a *via media* in sentencing disposals. However, in the period leading up to the introduction of community service in England and Wales, the confusion attendant upon the use of community service as a genuine alternative to prison persisted. The Home Secretary gave

greater emphasis to the role of community service as an alternative to prison when introducing the Bill into Parliament. Having identified people who had committed minor offences as the target group for such alternative sanctions, the Home Secretary was quite clear to state that if community service is not carried out as ordered "the alternative will be to go to jail" (H.C. Deb.vol.826.col.972).

The Parliamentary Debates emphasised the growing problems of increasing prison populations and community service was identified by a number of speakers as a suitable alternative to imprisonment, containing sufficient punitive and controlling features of the offender, while in the community. The presence of elements of retribution and reparation in the new penalty allowed for political and social acceptability for its introduction, where previously public sentiment about the existing non-custodial sanctions such as the suspended sentence, the fine and probation had been criticised as far too lenient. Accordingly the public impression expressed through the media was that community service was primarily to be an alternative to imprisonment (Pease 1980). This facilitated its operationalisation as public sentiment was generally disposed towards the sanction.

The Home Office Research Unit Study (Pease *et al* 1977) deployed a number of methods to measure the degree of diversion from custody of offenders placed on community service. Three of the four methods used indicated figures for such diversion of between 45% and 50%. The earlier experience in the use of the suspended sentence as a mechanism to divert offenders from prison is instructive in this regard (Bottoms 1981). Research by Oatham and Simon (1972) showed that 'of all persons awarded a suspended sentence only somewhere between 40% and 50% would, but for the new provision, have been sentenced to imprisonment for the original offence' (Oatham and Simon 1972). The Home Office Research Unit (Pease *et al* 1977) concluded that community service provided a 49% displacement from custody but these overall figures do not give any view of the use of community service between courts where one court might regard community service as an alternative to custody in about every case, whereas in another court community service might be allowed as an alternative to other non-custodial penalties. This can lead to inequities in the calculation of the hours of community service and in cases where breach of community service is initiated, the alternative penalty would likely be custodial in the

former court but not necessarily so in the latter court. Moreover, the court which deals with the breach may not be the same court which originally imposed the community service order. On this anomaly Pease has commented:

> If sentencers differ in their views of the place of community service in the tariff, then an offender appearing for revocation of an order will be sentenced on the basis of the view of the community service held by the revoking court or alternatively the view which the revoking court holds of the intention of the court which originally made the order. In either event, this may not coincide with the actual view of the sentencing court (Pease 1978:272).

The absence of a strict mandatory correspondence between imprisonment and community service in the legislation in England and Wales allowed for the ambiguous use of community service as an alternative to imprisonment. Young (1979) speculates that for reasons of political expediency, the Government did not want to exclude the use of community service in other cases where existing non-custodial measures were deemed inappropriate or inadequate. The community service order was merely restricted to offences "punishable by imprisonment" although Baroness Wootton was later to describe this limiting condition "as something of a nuisance and even gives rise to absurdities" (Wootton 1977:110). McIvor has also criticised this "tortured logic" whereby the court might have to firstly consider committing a convicted person to prison before then going on to decide to substitute the penalty with a community based penalty. McIvor's comments however relate to the jurisdiction in Scotland which community service scheme was initially based upon the system introduced in England and Wales but was subsequently restricted to the substitution of community service for a custodial sentence only (McIvor 1992). Ultimately, on this point Baroness Wootton concluded "imprisonability has to be retained as the hinge on which the power to substitute community service depends". In defence of this procedure it is argued that without the sanction of imprisonment in the background offenders will refuse to submit to a CSO (Wootton 1977:110).

Quite a significant number of Judges surveyed on the statutory necessity of a custodial precondition to the use of the community service in Ireland favoured the abandonment of such a high threshold. Instead, they advocated its substitution with a community service order which would be free standing and unconditional upon any other penal requirement. One judge indicated he would use the sanction more frequently in such circumstances. However s/he did reflect upon the difficulties which would be encountered to ensure compliance:

> "…I would have to say given my experience I think there has to be some link with it (custody) there because I just feel the way human nature is and the way the system is that if it weren't there, I would be unsure as to whether there would be the genuine (intent) to follow through… I tell you one of the things that I have learned about this particular job is that if you give an inch, a mile is taken and effectively I feel very strongly that if the coercive element were taken away completely in relation to the matter, that a mile would be taken." A6J1DC.

The categorisation of offences for which community service might be imposed in England and Wales as imprisonable offences helps to some degree in defining the type of offence in the scale of seriousness but it lacks the clarity provided for in the penalty of suspended sentences (S11(3) Criminal Justice 1972) where it is provided a court should not impose a suspended sentence unless the court had first determined that no other method of sentence is appropriate other than imprisonment, before suspending such term of imprisonment. It should be noted that the use of the suspended sentence, which in law is not a non-custodial sentence, has none the less operated as a sanction in its own right in spite of the clear immediate custodial criteria upon which Courts may suspend a sentence. The Criminal Justice Act 1972 and the Court of Appeal (R –v- O'Keefe [1969] 2QB 29;[1969] 1 All ER.246) were unambiguous and precise in specifying that the suspended sentence should only be imposed when the court decides that the case is one for imprisonment. Research has variably shown that between 40% and 55% of those given a suspended sentence would probably have been given immediate imprisonment if the suspended sentence had not been available (Sparks 1971); nonetheless it seems clear that in a large number of suspended sentences the courts, in particular Magistrates Courts, did not follow the policy mentioned in *O'Kæfe*. Instead of being used as an alternative to

imprisonment, the suspended sentence was often used for offenders who would not have been sent to prison before the Criminal Justice Act 1967 (Sparks 1971:387). [18]

When Pease analyses the diversionary effect from imprisonment for both community service and the suspended sentence he raises a central question which cannot be answered by quantitative analysis. He asks: "is there something in the sentencing process which makes the phenomenon of partial diversion inevitable?" (Pease 1980:37). This partial diversion is present, he demonstrates, both in community service where there is no statutory requirement on the court to contemplate immediate imprisonment before considering the option of community service and in the case of the suspended sentence where such a requirement is a condition precedent to imposing such suspension of sentence. In either case, the everyday operation of these penalties by the courts have proved resistant to change by the formulation of policy by Government once they have become firmly established in the sentencing structure (Young 1979:141).

The opportunity to anticipate the misapplication of community service as a sanction which would act as a genuine decarcerative medium certainly presented when the Wootton Committee, the subsequent working group, and the Parliament discussed the penalty. However, the pragmatic approach taken at each stage obscured any real attempt to construct the community service order in such a way which would bring about such decarcerative effect. As already noted, the community service order was "all things to all men" (Young 1979:23). It could not provide a sufficient sentencing response to all the conflicting demands made of it and as expected, in practice, yielded up inconsistencies which were consistent with these conflicting demands.

During the consultative process prior to the Criminal Justice Act 1972 the likely target group of offenders for diversion from custody was invariably described as the minor

[18] Suspended sentences were originally introduced in England and Wales in the Criminal Justice Act, 1967. However, this earlier legislation did not specify that a suspended sentence could only be used where an actual custodial sentence was otherwise intended. The *O'Kaefe* case prescribed this precondition which was subsequently incorporated in the Criminal Justice Act, 1972

offender, the young offender and the first time offender. The medium to long-term prisoner who occupies a prison place was not identified as the likely candidate for diversion to community service. Critically, this latter offender if diverted has a greater effect on the prison population than the short term offender. Moreover, any serious attempt at a decarcerative policy must address this group of offenders who make up a significant segment of the daily prison population.

The introduction of any new penalty always carries the risk of unintended displacement from other established penalties. Spark's image of the ladder, to represent the scope of criminal penalties ranging from unconditional discharges at the bottom end through probation, fines, suspended sentences and imprisonment at the top end, is instructive as an image to locate the offender in the scale of penalties. The traditional view of the recidivist offender proceeding up the ladder of seriousness is well established (Sparks 1971:384-401).

Using this typology, the number of offenders who would otherwise receive a custodial sentence but for the imposition of a suspended sentence is about 50% (Sparks 1971:387). Therefore, 50% of offenders who receive a suspended sentence descended to just below the top rung of the ladder (Sparks 1971:398). But another 50% who would not have received a custodial sentence, are elevated to the same rung of the ladder. Previously, this latter cohort, who would not have received a custodial sentence, would have received probation or a fine, a position mid-way or at the lower end of the ladder. If one applies a similar analysis to community service offenders, between 45% and 50% according to Spark's study, would now occupy a rung on the ladder which is below imprisonment (Top rung) which group would have ascended to the top rung but for the availability of the penalty. A number of considerations arise from this type of analysis. Firstly, the partial diversion of offenders from custody at circa 50% suggests that the residual group so sentenced whether to a suspended sentence or community service were upgraded on the ladder of seriousness and did not properly belong in a position as high on the ladder. The provision of a new sanction in the circumstances has displaced a more lenient penalty such as probation or a fine. This comparison by Sparks with the suspended sentence can also be applied to any consideration of community service. The nets of social control (Cohen 1985) in this analysis can be seen as extending to that residual group who would otherwise

not receive a custodial sentence. By placing this residual group one rung below imprisonment, those offenders within this group are on greater hazard of ascending the final rung of the ladder through breach procedures more easily than would have been the case if a fine or probation had been applied.

The position of community service in the sentencing tariff in England and Wales must remain ambivalent as a result of this structural feature in the original legislation (Young 1979). It will be shown in the next chapter how the Irish legislature sought to deal with this dilemma when they unambiguously fixed the community service order as a direct substitution for an immediately contemplated custodial sentence. In doing so the Irish authorities relied heavily upon Young's research which emphasised the unsatisfactory application of conflicting sentencing aims in the English sanction.

The extent which Irish sentencers maintain fidelity to this requirement was questioned by Walsh and Sexton (1999) and to some degree this is borne out in the empirical work of this study where at least two Judges stated they would sometimes use the sanction without reference to the prior custodial requirement. In this regard one judge stated:

> "…Well I would use it for offences which might not necessarily warrant a prison sentence because I feel it is something that a particular Defendant, I think that it would be good for him or her as a penalty, as a sanction if you like" A1J3DC.

While another "confessed":

> "…I have perhaps technically sinned of course against the legislation a few times – not an awful lot of times but in a case where I would normally be imposing a heavy (fine) and I do fine very heavily

> on Section 49,[19] very, very heavily and I acknowledge that. At the same time I am always conscious that a serious case of drunken driving… is as bad for a poor man as it is for a rich man. I find it very hard to say well if he is a poor man I'll fine him €100 and if he is a rich man I will fine him €1,000. A few times I have sinned. The alternative 60 days "in default of payment" I am treating it really as a prison sentence and I am going to give you community service and they have taken it up. Again I am stretching the law…" A4J2DC.

Another judge sought to interpret the use of the community service order as an alternative to custody from the perspective of the accused person and not that of the sentencer when he stated:

> "…the first thing is I have a very firm idea of where people who are often in court see it. They see it as a great victory. They are not impressed by it as an alternative to custody. You really only make one distinction – is it custody involved or is it not?... I speak of the Defendants… that is their daily concern. It might be different perhaps with a very young Defendant. I think that by confining it to cases where custody would otherwise be appropriate, it tends to affect a relatively hard nosed group of Defendants and I don't think that they are impressed by it" A8J1SC

In summary, the type of community service introduced in England and Wales was subject to a structural defect which allowed the sanction to be used widely, provided only that the offence charged was an imprisonable offence. The sanction achieved partial success as a decarcerative measure by diverting only 49% of offenders from custodial sentences (Pease *et al* 1977). But the sanction may be seen to be misapplied if 51% of offenders were given community service when avoidance of custody may have been its primary purpose. The sanction was introduced in England and Wales on an experimental basis where no clearly defined goals were specified in advance. Moreover, the political and media debates preceding its introduction tended to confuse and obscure any real attempt to invest the community service order as a distinctly decarcerative instrument. The ambiguity of purpose which is a salient feature of the community service order in England and Wales

19 Section 49 Road Traffic Act 1961 as amended. Driving while intoxicated (subsection 1) or driving with excess alcohol per blood (subsection2) urine (subsection 3) or breath (subsection 4).

inhibits any clear measurement of effectiveness of the sanction. If it is decarcerative, it is only successful for every second sentence made. In contrast, the Irish community service order is clearly decarcerative in purpose and design. Nevertheless, the Irish judges were enthusiastic to see the strict avoidance of custody criterion abandoned in favour of the English model. Despite the requirement that Irish judges must firstly be of the view that a custodial sentence is necessary before a community service order may be made, a few judges did admit to experimentation with community service as a stand alone penalty. Another judge criticised the prior custodial requirement from the perspective of the offender who is about to be given a custodial sentence but receives a community service order instead. Such an offender he opines is given a less demanding penalty. But common to the community service schemes for both jurisdictions is the identification of the sanction as most suitable for young and first time offenders and for minor offences. Otherwise, the use of community service as a decarcerative instrument for recidivist, serious and more mature offenders was not deemed desirable. Apparently, such offenders were destined not to be diverted from custody at all. Thus, an element of bifurcation in the selection of offenders for community service is seen to emerge.

RECIVIDISM AND COMMUNITY SERVICE

The passage of the Criminal Justice Bill 1971 which heralded community service into law was accompanied by a sense of optimism both in Parliament and in public that the penalty could help to transform the behaviour of offenders, a component which was perceived to be absent in existing penalties such as imprisonment, the suspended sentence and even probation. By 1977 the editorial of the Probation Journal proclaimed that "the acceptance of community service by the courts and even by hard line politicians has been the penal success story of the century" (Probation Journal 1977:107). Clearly, in the short number of years, community service was seen as a settled mainstream penalty used by the courts which had gained social acceptability.

The Home Office Research Unit Report (Pease *et al* 1977) sought to assess the success of the sentence in terms of early recidivism. Using a control group of offenders who had

been recommended for community service by the Probation Service, but had in fact been dealt with otherwise, and a cohort of community service offenders, the study showed that 44.2% of community service offenders were reconvicted within one year compared with 33.3% of the control group. This study is hedged with certain caveats particularly relating to the non-randomised selection of the control group. Pease *et al* (1977) found that roughly 44% percent of offenders given community service were reconvicted within twelve months compared with 35% percent of a comparison group who were imprisoned and 31% of the second comparison group who were not given custodial penalties. While the comparison groups were not fully comparable with the experimental community service group, especially in terms of age, which feature was related to reconviction, the Home Office Research Unit concluded "there is no evidence of any reduction in reconviction rates following community service (Pease *et al* 1977:18). Some studies have shown that persons ordered to perform community service are no more likely to be rearrested and convicted than those who had been imprisoned or made subject to probation orders (Berk and Fehilly 1990; McIvor 1992) while other studies have lower levels of recidivism among such offenders (Ervin and Schneider 1990; Schneider and Schneider 1985). Any attempt to evaluate community service as an improvement in terms of recidivism upon earlier available penalties must measure such success with comparisons with the efficacy of imprisonment, the penalty primarily identified by the Wootton Committee for replacement by community service. Baroness Wootton responded to the Home Office Research Unit Report (Pease *et al* 1977) as "a masterpiece of bureaucratic caution combined with underlying optimism" (Wootton 1977:111) suggesting that community service even if judged by this standard was not found to be superior at least it was cheaper and had some benefits to it.

The question whether community service might act as a transformative agent in the behaviour of the offender sentenced to community service remained open. The issue is not much advanced when viewed through the lens of optimism or pragmatism. Rex (2001) when examining three studies by Lloyd *et al* (1995), Raynor and Vanstone (1997) and May (1999) identified certain marginal indications that community service may be effective in reducing offending. The May (1999) study which allowed pre-sentence social factors such as drug addiction and employment to be added to offender characteristics such as sex, age and previous criminal histories showed offenders in community service

were still significantly below the predicted reconviction rate at one percent, whereas Lloyd *et al* and Raynor and Vanstone found such offenders sentenced to community service at three percent lower than the predicted rate of reconviction.

The presence of individual predisposing factors towards offending are combined in the sentencing process to allow the identification of features of community service which may have a positive effect upon reconviction. A feature which may be identified from this admixture of offenders' individual predispositions and the sentencing process relates to the offenders internalisation of the sentence as either fair or unfair. While those sentenced to short terms of imprisonment were found to have fared no worse than those on community service in terms of employment or relationships, the authors Killias and Ribeaud speculate that "reductions in recidivism may depend less on improving job and other life perspectives and more on helping offenders to view their conviction and sentence as a result of their own behaviour and not of a Judge's … fault" (Killias and Ribeaud 2000: 53). As a corollary of this they advise that offenders are more likely to gain insight into the correspondence between the penalty and the offending behaviour if Judges take the time to explain why a specific sanction is being applied. By communicating the sentence in this manner (Duff 2000) the offender is more likely to internalise the meaning of the sentence.

In this study, the internalisastion of the sentence of community service by the offender was remarked upon by a number of Judges at all of the jurisdictional levels. One Judge perhaps best summed up this phenomenon when he said:

> "I think what's trying to be achieved is to give the accused who is now convicted an input into his sentencing. That means it is his choice to do community service. He has to say he wants to do it. That's a big difference in the rest of the sentencing. It allows him an opportunity, a chance to avoid the prison sentence, which we all wish he would do, but it is within his control and it is within his choice. It gives him an opportunity to take ownership of his life and avoid the jail sentence and do the community a service at the same time". A4J1DC

The Wootton Committee anticipated a positive feature of community service which was later confirmed and which would be seen to significantly influence the subsequent behaviour of offenders sentenced to community service, namely, the optimal matching of specific offenders to community service schemes which would best suit their potential to reintegrate them more fully with society on completion of the order (Mc Ivor 1998:56). The caution expressed by the Wootton Committee to resist the tendency to deal with community service offenders in large scale offender only projects is recognised implicitly in this perspective. The reintegrative potential of working with beneficiaries may lead to personal reassessment of behaviours, cognitions and life-style by an individual offender when placed on a scheme which challenges the offender's world view. McIvor has found in this regard:

> In many instances, it seems, contact with the beneficiaries gave offenders an insight into other people and an increased insight into themselves; the acquisition of skills had instilled in them greater confidence and self esteem; and the experience of completing their community service orders placed them in a position where they could enjoy reciprocal relationships – gaining the trust, confidence and appreciation of other people and having the opportunity to give something back to them (McIvor 1998:55).

She identifies a placement within optimal community service schemes as a "vehicle through which an informal yet potential powerful process of close social modelling may occur" (McIvor 1998:56). The inclusion of close social modelling in community service would however require the tailoring of community service orders in combination with probation orders to maximise the modelling effect for change in offender behaviour.[20]

20 The potential to include a probation aspect in a community service order is now provided for in England and Wales under the Criminal Justice Act 1991 in the so-called combination orders.

Participation by an offender on community service affirms his consent but the offender as such is not in control of the type of work he/she may perform. The opportunity to instil an element of close social modelling into a community service scheme is inhibited to the extent that the scheme may present as boring, meaningless and disconnected with the offender's experiences. This is particularly so in relation to large scale environmental projects. On the other hand an offender who is imprisoned is subjected to a regime which objectifies him and negates his consent by the physical confinement of the prison. In a survey of sentencers in Scotland one Sheriff put it thus: 'from my point of view I am looking for the offender to glimpse his own dignity and for the community to say that it was fitting; that is the ideal' (Carnie 1990:30). Community service schemes which harness the offenders' strengths and potential must be seen in this context as providing a superior opportunity in the reintegration of the offender. A well designed placement might also have a positive impact on completion rates and upon the offender's attitudes and behaviour (McIvor 1990).

In this study one Judge questioned whether there was any real benefit by way of changed behaviour to be achieved from community service. In particular he referred to the benefits which are otherwise missed by not placing the offender on a training course but rather engaging the offender in projects which may be poorly organised and impersonal:

> "It doesn't fulfil the role that a course of training would. It's also usually very unskilled. We heard a case where a man was suing for personal injury acquired while he was doing community service and the general impression I got from both sides was that the whole thing was rather chaotic. ... I don't know whether they benefit greatly from cleaning up cemeteries or sweeping up the yards of old people's homes …" A8J1SC.

The arrival of the community service order in England and Wales in the 1970s occurred at a time of significant change in both social outlook and values. A new sanction which would keep certain offenders out of the prison system, while still making demands of the offender, presented as an attractive alternative. But such was the optimism of the age that additional advantages were claimed for the new sanction. In particular, the prison system

was perceived to have failed when the issue of recidivism was examined. Community service on the other hand had the capacity, it was claimed, to transform offending behaviour where the offender would experience close contact with deserving beneficiaries and voluntary co-workers. But follow up research was to challenge this nostrum by demonstrating that application of the sanction made little or no difference to recidivist rates. Later research did identify certain variables which were seen to enhance compliance and improve certain behaviours. The offender's capacity to internalise the sanction as fair was considered an essential building block in the success of the sanction. The judges comments on the offender's internalisation of the sanction disclosed that the potential for change may occur if the offender admits the offence and accepts responsibility by performing community service. But they also identified features of community service schemes which may alienate the offender rather than enhance his/her capacity for change. Thus, the optimism which accompanied the introduction of community service may not have been matched by the expected transformations which were originally claimed for it.

GUIDELINES STANDARDS FOR THE ADMINISTRATION OF COMMUNITY SERVICE ORDERS

The consent of an offender to perform community service is a necessary precondition to the making of such an order. However, as Vass (1990; 1984:83) points out the presence of such consent in the order is no indication that the offender is eager or willing to perform unpaid work for the community. The offender is more likely exercising a rational calculation of avoidance of a penalty which s/he calculates could be far more punitive and controlling of him/her. As the threshold for community service orders in England and Wales is that of "imprisonable offences" the offender has no prior method of knowing what the alternative penalty will finally entail should s/he fail to perform the community service order. As will be seen in Chapter 3 this precise difficulty is removed in the operation of community service orders in the Republic of Ireland by the provision that every community service order must be in substitution for a prison sentence.

In England and Wales the unknown risk of a harsher penalty such as imprisonment is avoided by proffering consent to perform community service, but the offender in so doing is aware s/he may have equally miscalculated the offer of consent to perform community service in lieu of a less stringent penalty such as a fine or probation. The offender has no method of avoiding this dilemma of committing himself/herself to a sanction which will require him/her to perform work with strangers, some of whom s/he may dislike or not identify with. S/he must attend for such unpaid work over a period of weeks if not months, at times which would curtail his/her leisure time and lifestyle. All of this work activity is subject to surveillance and control which if not performed properly and in a timely manner will attract further penalties for non-compliance.

It would be naive to assume that an offender, particularly an habitual offender, when placed on a community service order, would present as a well-adjusted and eager participant in community service, although such generalisation may not be true for all offenders. For those offenders who firmly believe that they have avoided a certain term of imprisonment, there is a certain amount of relief but once the commitment required to perform a community service order is fully appreciated especially when the order is one of long duration of hours, reality sets in for such offenders (Vass 1990:118). The participant observation study which Vass conducted (1984) provides a fascinating insight into the working of community service schemes and in particular identifies behavioural and attitudinal characteristics of offenders when working on community service schemes. Vass noted a tendency towards dissociation on the part of offenders whether through avoidance of work within the scheme or through absenteeism. Some offenders present outwardly as incapable of performing straight-forward tasks as a technique of avoidance of work while others present as perpetually unwell on such schemes. Other offenders appear willing to perform work but complain that the tools and materials are not being supplied and this is frustrating of them. These reactions have been identified as being instrumental adjustments on the part of offenders as solutions to the constraints of community service organisation rather than personal characteristics or traits of individual offenders as Vass notes:

> "They find ways in which they attempt to neutralise or minimise the constraints and restraints imposed upon them. They invent and develop at some point certain idiosyncrasies – that is to say, "personality" traits – which they use to legitimately excuse themselves from doing such work". (Vass 1990:118).

A common thread of discontent running through many community service schemes whatever the level of commitment or dissociation is the complaint by offenders that the work performed is not useful or has no tangible reward either for the offender or the community. This criticism is especially made when offenders are working in groups and in projects not immediately recognised in their minds with community. Besides the elements of avoidance by offenders which were observed by Vass (1984) *in situ*, the primary form of dissociation or withdrawal of consent to participate in community service is the phenomenon of absenteeism (McWilliams and Murphy 1980; Young 1979; and Vass 1990). Absenteeism is the failure to attend work without a reasonable excuse. Failure to attend for community service work without an acceptable explanation is a breach of the community service order. Absenteeism is the ultimate dissociation by the offender from the community service order.

While consent is a necessary precondition to the making of a community service order, the maintenance of that consent on the part of the offender is required to complete the order in its entirety. If the offender fails to attend without reasonable cause at a community service scheme it may be inferred that the consent originally offered is either withdrawn conditionally or absolutely. This presents a major challenge to the probation officer supervising such a scheme. In this regard Vass found as follows:

> "Absenteeism is not only an endemic feature of community service which occasionally may run at an average rate of one quarter of all attendances per month, but also many – as much as half – of those absences are due to reasons considered as

> unsatisfactory or unreasonable by Supervisors. By and large, 'legitimate' reasons advanced by offenders are in relation to sickness, family illness and employment in that order" (Vass 1990:119).

Certain additional features begin to develop within the practice and organisation of community service schemes which militated against the completion of community service orders by offenders. Increasingly the Probation Service was required to negotiate, cajole and finally threaten breach proceedings before compliance could be achieved.

In the six pilot areas used in the initial period and indeed in the full implementation of the schemes throughout England and Wales, practical guidelines which were contemplated for the original legislation to give cohesion and uniformity to the Scheme were not brought forward. The Under Secretary of State when speaking on the legislation stated:

> There are four aspects about which the Secretary of State will have to lay down general rules to cover work with community service. It is obviously necessary that there should be similar arrangements throughout the country with regards to the keeping of records, the reckoning of time actually worked and ensuring that it is actually done. (H.C. Debates, Standing Committee G 10/2/72).

Young points out that despite this obvious necessity no such rules had been made by 1979. In a sense, the standards used insofar as these were settled standards during the experimental period continued until the introduction of the National Standards for Community Service in April 1989, a period of sixteen years. While procedures were settled within individual Probation and After-Care areas the same procedures were not adopted universally across all of the 55 Probation and After Care areas. This lead to notable discrepancies and a perception among some sentencers that community service was subject to the same discretionary practices used in traditional probation. A noticeable decline in the use of community service orders by the courts was evident, decreasing from

35,670 community service orders in 1987 to 34,040 in 1989 (Home Office Research and Statistics Department No. 31 1991).

Young (1979) attributes the lack of any attempt to achieve an overall uniformity of approach to a number of inter-related factors. The deliberate ambivalence in the purpose of the sentence obscured any clear initial perspective that the sentence was primarily punitive rather than seeking to satisfy any other primary goal of sentencing. This ambivalence was confounded by placing the organisation and administration of community service into the hands of a service which was then firmly informed by the rehabilitative paradigm of sentencing. Additionally, local conditions were accommodated into schemes which required certain flexibility on the part of community service organisers, for example, in a rural area time for travel to work might be discounted from the number of hours of community service to be performed.

The arrival of the national standards for community service orders in April of 1989 presented a sharp challenge to the traditionally discretionary practices of the Probation Service in the administration of community service orders. Although the tradition by the probation officer to offer help to the offender to change his behaviour continued during this period, the probation officer was not precluded from viewing the offender through a number of different and seemingly conflicting paradigms. Such models of man whether moral, ethical, psycho-pathological and psycho-social can be deployed by the probation officer to justify practice (McWilliams and Pease 1980). While this latter view might equally be criticised as an *a-la-carte* justification of professional practice, the ability of the Probation Service to match the correspondingly fluid and seemingly conflicting aims of sentencers allowed the Probation Service to negotiate a pathway on behalf of their clients while maintaining a firm commitment to the positive non-custodial features of community service such as reintegration in a socialised environment. The imposition of national guidelines in England and Wales and in Scotland brought about an adjustment in probation practices when dealing with community service orders. No longer would the extension of discretion be allowed in respect of non-compliance with community service orders where the offender failed to comply with the terms of the order. McIvor reports that offenders on community service in Scotland adjusted their compliance practices once they had

learned the limits to which they could test the probation officer's discretion when applying the standards (McIvor 1992:185).

At the time when the national standards were introduced, The Probation and After Care Service structure in England and Wales was divided into 55 different services. It was therefore to be anticipated that slightly different interpretations might be given to the purpose of community service across this large number of semi-autonomous agencies. Moreover the individual practices which were used to operationalise the community service schemes were bound to result in significant differences of approach when analysed. The principal issue which the National Standards sought to address was the application of uniform compliance procedures and the general discipline of offenders during the performance of community service. Researchers had drawn attention to variations in practice in bringing breach procedures against offenders who had repeatedly failed to turn up for work sessions (Young 1979; McWilliams and Murphy 1990; Pease 1985; Vass 1984). In one study conducted by Eysenck in 1986, it was found that the Probation Service staff were prepared to accept a 25% level of non-attendance and she referred to the excessive tolerance of absenteeism before breaches were brought back to the court (Eysenck 1986).

When the national standards were introduced, some Probation Services reported difficulty in working the prescribed standards. In particular, the national standards specified that firm use of the breach procedures was to be used for absences from community service which were deemed unacceptable, such breaches being the building-blocks upon which breach proceedings are typically taken (McWilliams and Murphy 1990). Breach proceedings are warranted accordingly to the national standards when the number of unacceptable absences exceeds three. The proportion of cases where breach proceedings were commenced after four or more unacceptable absences decreased significantly over a period of two years coterminus with introduction of the national standards in April 1989 and there were significantly fewer cases where very large numbers of unacceptable absences had accrued prior to the procedure of breach being initiated (Lloyd 1991). The evaluation of the effect of the national standards would seem to indicate a major realignment of probation officers practices to ensure the offender`s compliance with the order. (Lloyd, 1991:19)

In Scotland, the introduction of national standards and the further revision of that policy in April 1991 brought about an increase in the number of offenders breached. Community service schemes are now required to initiate breach proceedings against offenders following the third failure to comply. Provided community service staff clearly communicate their expectations to offenders and appraise them fully of the implications if they fail to comply, offenders tended to adjust to the more rigorous expectations placed upon them by staff (McIvor 1992:185). In the Scottish studies McIvor demonstrated that:

> "The more stringent enforcement of orders produced increased compliance and did not necessitate greater numbers of offenders being returned to court. It appeared that offenders were well aware of the extent to which staff would tolerate absenteeism and that while many took full advantage of the leeway that existed, few were prepared to overstep the mark and risk being breached." (McIvor 1992:185).

In many respects the probation officer is like the police officer who exercises discretion to prosecute an offender when presented with clear evidence of the commission of an offence. The police officer may decide to issue a caution to such a person rather than prefer formal charges, which would launch the person into the criminal justice system. By so administering a caution, apart altogether from the avoidance of costs which such charging of a citizen would generate for the criminal justice system, the police officer is exercising a dispositive decision which is analogous to sentencing (Ashworth 1994:138).

Similarly the probation officer makes dispositive decisions and applies dispositive values in the assessment of non-compliance issues by offenders on community service. While the offender's consent to perform community service has been described as a rational choice in the face of unknown risk of a harsher custodial sentence, the dispositive values of the probation officer are similarly conditioned by the very same risk of unknown alternative penalties should the probation officer engage the Court further in breaching the offender

for non-compliance. Where the probation officer is allowed discretion in this regard s/he is likely to apply values which seek most to protect the offender from a more punitive sanction. This dilemma has already been identified at the initial social enquiry stage when in some cases the probation officer might be tempted to recommend community service to avoid an anticipated custodial penalty.

The practices which evolved to encourage compliance by offenders include postal communications by recorded delivery, home visits and disciplinary interviews (Vass 1990; McIvor 1992). By using such procedures, which in the main encourage compliance with community service, the probation officer gives expression to an ethic of tolerance for minor infractions by offenders on community schemes. This process of tolerance is characteristic of the cautioning procedures to ensure compliance, where the expectation of compliance prevails. In this negotiated relationship between the probation officer and the offender the parameters of this tolerance are made explicit by the introduction of the national standards. While some offenders are content to perform their community service without demur, it is expected that offenders may test the extent of such tolerance until its limits are reached and breach proceedings are inevitable. Vass (1990) considered the benefits of such tolerance thus:

> The process indirectly promotes in public the value of community service as an effective penal measure, and in private protects many offenders from re-entering the criminal justice system as defaulters of their order. In essence, that tolerance expressed by those officers and their elastic responses to infractions of the order may be instrumental in expanding the opportunities open to offenders to remain in the community and outside the walls of prison establishments. In other words, by using formal sanctions as a last resort and focusing instead on methods which allow protracted process of negotiation, those officers may in fact, without realising it, be promoting the basic and fundamental justification for providing and running alternatives to custody. (Vass 1990:130-103).

But he cautioned against over-restricting such tolerance of infractions by probation officers in national standards, claiming that they may well structure community service, but they will not destructure the prison where the anticipated increase of breach procedures would increase the input into the prison system of offenders on community service, thus defeating its original primary aim.

The use of warning letters, home visits and disciplinary interviews continued to be used by the Probation Service as the main techniques to ensure the successful conclusion of community service orders. The pressure of a 12 month time limit within which the community service order is to be completed might be regarded as a positive impetus to ensure compliance. However, where a client offender fails to commence the community service within the twelve days prescribed by the national standards and/or fails to attend regularly throughout the agreed period for community service work, especially in cases of long community service orders, the pressure to ensure compliance before the year expires creates difficulties both for the probation officer and the offender who may require an extension of time by the court to complete the order.

The immediate effect of the standardisation of compliance procedures, which came about by the introduction of the national standards in 1989, was a reversal of the decline in the use of community service orders by the courts. This may have been due to increased confidence by sentencers in the penalty as a result of a perception that community service would be subject to less probationising influences and would reflect more closely the sentencers original intention that the order was to be completed without unnecessary delay and avoidance (Lloyd 1991)

As noted, the confidence by sentencing courts in the due execution of sentences tends to be reflected in the frequency in which such courts resort to particular types of disposal. The current perceptions and practices of the Irish Judges interviewed in this study reveal approaches which reflect the full range of probation practices both before and after the introduction of national standards in England and Wales. In response to the question

how do Judges deal with breach of community service in Ireland, the replies varied considerably as follows:

"The Probation Service… will present to me a schedule of when the order was made and how long it was made for and the progress during that particular order and it is significant through that schedule that they will give me that 3 or 4 times followed by a warning letter, followed by a call to the house, followed by another warning letter, that they will go to effectively the ends of the earth before they will take the step to bring the matter to court. To me that suggests that they exercise a huge discretion but they get to the point where they say enough is enough". A6J1DC

"It depends on the breach. To impose the original sentence it would take a major breach. Very often they would have a reason whatever it is; my mother is sick or my girlfriend is pregnant or the child was sick or something like that. If they are sufficiently well represented by somebody particularly articulate, they may well overcome any difficulties they have. It depends upon the circumstances". A3J1CC

"The Probation Service seems to be fairly proactive about doing it…. There haven't been that many back. I was just trying to think – 2 or 3 is as much as I have seen back". A7J1CC

"It depends on how long they have been working at it. If they (probation officer) are new to it, they probably allow excessive room to the offender. If they are at it a long time they start to get tired of people who don't keep their words and don't do their work and they are faster to bring them back". A4J5DC

"I always give another chance" A4J2DC

"Instant incarceration" A1J7DC

"You say at the outset that this is the amount of time in prison or this amount of community service is to be served and if they breach that, you tell them this is what comes into effect. Definitely a term of imprisonment". A1J1DC

"If he decided straight away or pretty soon into the community service order he wasn't doing it, that he was thumbing his nose, then he would get the sentence straight away. … I think it would be quite unfair to impose the full sentence on top of three-quarter compliance with the C.S.O., so in those circumstances I would try to limp to the end of the community service order by allowing extra time." A4J1DC

"Well I would start with the same principle as issuing suspended sentences. I start with the very simple premise and I say to them that I am not in the cajoling business. I am not in the coaxing business. I have made my order. I have tailor-made my order as best I can and I give them the guidance and give them the light at the end of the tunnel and have not dealt with them harshly. Mind you, if they are then brought back, of course I examine the circumstances but they would want to be very real circumstances before I would desist from re-instating the prison sentence." A7J3CC

These views reflect a wide range of discretionary approaches by the judges to the issue of enforcement of community service when presented before the courts. But when considered in their diversity, they might be regarded particularly resistant to any form of standardised approach to the issue of breach at the court level. Accordingly when one compares the discretionary practices by the Judges, it is not to be unexpected that such practices would also predominate at the supervisory level by probation officers in the performance of community service orders.

As noted, in England and Wales the introduction of national standards for the Probation Service gave rise to an increase in judicial confidence to utilise the sanction more frequently. Perhaps a similar standardisation of community service in Ireland, if sufficiently notified to the judiciary, might equally result in a greater use of the sanction. However, as noted, current judicial practices when dealing with a breach of community service, are quite variable. Thus any attempt to standardise by strict criteria the

administration of the community service order in Ireland by the Probation Service may give rise to greater use of the sanction. However this may not translate into a consistent approach among the sentencers themselves when dealing with breaches.

The arrival of the national standards also had a transforming effect on the role of probation officers and their relationship with clients. Standards imposed by the Home Office upon the Probation Service, through the national standards, added significantly to the original controlling function which the Probation Service adopted when they first began administering community service in 1973 (Nellis 2004). Over the years that followed the Probation Service could be seen to shift from the traditional role of social worker, with all the discretionary practices used within that paradigm to the wider function of supervisor within the criminal justice system which in part included the social work role. No longer would the function to advise, assist and befriend solely define the probation officer. The service was to move to a more conflicting role of enforcing court orders of community service perhaps changing forever the perception of the probation officer as the offender's friend.

However, the most significant result of this concerted policy of breaching non-compliant offenders was the increase in the number of offenders who might receive a custodial sentence upon being breached (Pease 1980:33-38). This increase in the custodial population might be considered an unnecessary incarceration of a cohort of offenders who might in the first instance not have received a custodial sentence (Sparks 1971:398).

COMMUNITY SERVICE – AN EVERYDAY PENALTY

Before considering the introduction and use of community service in the Republic of Ireland in Chapter 3, the emergence of community service as a mainstream penalty in England and Wales was discussed in this chapter and the previous chapter in order to more fully understand the sanction itself and the sense of expectancy which preceded its

introduction into Ireland. As will be seen, the Criminal Justice (Community Service) Act 1983 which introduced community service into Ireland was very closely modelled upon the legislation which was introduced in England and Wales under the Criminal Justice Act 1972, as amended. At the time of writing this study, it is important to stress that the specific penalty of community service in England and Wales may now be combined in a Combination Order of Community Service and Probation under the Criminal Justice Act 1991. Community service orders in England and Wales are now called Community Punishment Orders under the Criminal Justice Act 2003. It is not without significance that a sanction which commenced in 1972 as a reparative measure has been transformed into a sanction which now carries a specific reference to punishment in its title.

Hood's (1974) earlier description of the Wootton Committee proposal as a chameleon is perhaps more apposite today, where the chameleon may be seen to take on a dynamic quality by running up and down the tariff scale when the penalty is either viewed as a punitive measure, as a stand-alone penalty or as a quasi-rehabilitative measure when placed in combination with a Probation Order. The model of community service which was introduced into Ireland in 1984 is perhaps best understood by studying the original community service order introduced in England and Wales in 1972 without further reference to combination orders or orders that seek to extend the scope of the penalty beyond the community service penalty itself. Although, the community service project introduced into Ireland is almost identical with the community service as originally introduced in England and Wales there are however differences which will be discussed latter in Chapter 3.

Increasingly, within the criminal justice legislation and systems in Britain and America, there is a distinct movement in favour of increasing control and surveillance of offenders (Garland 2001). The willingness by politicians, the media and society in general to consent to the use of "community-based sanctions" has been accompanied by concomitant demands that offenders who serve their sentences within community settings, should be increasingly subject to such control such as electronic tagging, curfews and probation supervision (Roberts 2004). Without knowing whether such offenders were in serious risk of imprisonment for the original offence, it is arguable whether these new measures of

control can have the effect of diverting offenders from prison, particularly as technical breaches of such programmes, such as curfews, may trigger breaches which result in imprisonment. Such offenders might, but for the introduction of such measures, have received a far less onerous penalty previously (Von Hirsch 1990).

This recent trend to combine community service with other methods of disposal may incorporate aspects which will make compliance by the offender with community service more unlikely, as the opportunity to breach not only the community service order but other limiting requirements on the offender`s lifestyle will increase. Although, completion of the community service order is essential to avoid proceedings for breach against the offender, the difficulties encountered between the probation officer and the offender to ensure compliance, have already been noted (Vass 1990; Eysenck 1986). It is probable, that any additional compliance required of the offender may put in jeopardy the completion of the community service order by the offender, if he is less motivated. The retention of the community service order as a discrete penal option is highlighted by this negative scenario.

The operation of community service in England, Wales and Scotland over a number of years allows one to draw certain tentative conclusions about its structure, operation and impact as a penal measure. At the initial stage a probation officer must assess the offender as suitable for community service and must indicate to the court that work is available. Suitability of the offender for community service turns essentially upon the assessment of risk to the beneficiaries of the scheme by the deployment of offenders who might re-offend in situ or behave violently towards other co-offenders or beneficiaries. In practice, risk to the beneficiary community has been a minimum problem (Roberts 1980) where the professional experience of probation officers in making such assessments was used to accurately reflect the low incidence of offending within community service schemes. [21]

21 In DPP –v- Timothy Nelligan 18th April 2008 Cork District Court the defendant, Mr. Nelligan was found by the Probation Service to be unsuitable for community service on the basis of a prior conviction for arson. The probation officer's report indicated that for health and safety reasons the defendant would not be suitable. His solicitor, Mr. Buttimer, submitted that the alternative was a custodial sentence and accordingly his client was being doubly penalised. A possible judicial review of the Probation Service determination was considered but abandoned by the defence. In the event, Mr. Nelligan received a custodial sentence which is under appeal at the time of writing(Irish Examiner 19 April 2008)

The extent to which the reports by the probation officers acted as a conduit to draw offenders into the penalty of community service is unclear in the literature, especially when, as Young (1979) has identified, offenders receiving the penalty '...were on average younger, had stronger community ties, and had less extensive experience of both custodial and non-custodial sentences than those sentenced to imprisonment' (Young 1979:116). This would suggest a silent mechanism in the selection of offenders for community service which identifies certain offender characteristics favourable for community service to the exclusion of others, but which also had the result of moving the same group of offenders up the sentencing scale. Of course, the preparation of the social enquiry report and the assessment for suitability must be seen in the context of a request by a court to provide such a report. The court would initially be minded to impose a community service order before requesting such a report. Young has identified the locus of this mechanism in the overall sentencing outlook of the courts which he surveyed.

The second requirement of a community service report is the confirmation that suitable work is available to be performed by the offender. Such work schemes may range from individual personal placements in voluntary agencies without a community service supervisor present, to schemes of multiple offenders where there is no direct contact with the beneficiary or community and the group is under the direct supervision of a community service supervisor. The latter community service schemes tend to include offenders who require a higher degree of supervision and the tasks undertaken tend to involve "environmental" type projects such as parks and garden clearing. Success in completion of community service is closely related to the sense of satisfaction with the work done, combined with a tangible result for the beneficiary (Flegg *et al* 1976; McIvor 1992). Offender only schemes which appear remote from the beneficiary were reported by offenders as boring and more punitive. The quality of work undertaken has been identified as a key to the success of community service schemes. Flegg *et al* (1976) articulated this within the offenders' perspective as follows:

> … an offender's definition of what constituted a case of 'need' was clear. When on practical decorating tasks, they weighed up the kind of homes to which they were being sent and made assessment about whether the person was "needy" or not…

> Many responded … by indicating that their work had helped an individual and as far as they were concerned that was right and sufficient … what was of common concern here was that efforts should be appropriately directed (Flegg *et al* 1976).

The ambivalent policy behind the introduction of community service orders (Young 1979) which sought to address and satisfy a number of conflicting sentencing objectives gave rise to equally inconsistent results when these came to be evaluated. The primary stated aim of the Home Office that community service should be used as an alternative to custodial sentences was certainly less emphasised in the Working Committee Report, where the use of community service was anticipated as a wide ranging intermediate penalty which could even be substituted for a fine.

The failure to provide a more fixed position for community service in the scale of sentencing when the measure was debated in Parliament might be partially responsible for the widespread use of community service orders for offenders who previously would have received probation or a fine. The proportionate decline in probation orders which accompanied the introduction and growth of community service orders suggests that the community service order was used widely as an alternative to this specific non-custodial disposal. Moreover, the use of the penalty for offenders who would be considered less of a risk to the community service scheme itself and to the wider community (Young 1979) instead of offenders with established criminal records, who would normally receive a custodial sentence, suggests that courts deploy a bifurcatory process (Bottoms 1979) in selecting offenders for community service.

As previously noted, the studies of Pease (1975; 1977) McIvor (1972), and Young (1979) indicate that less than half of the offenders who were sentenced to community service would have received a sentence of detention or imprisonment, but were exposed to the distinct possibility of a custodial sentence in the event of a successful prosecution for breach of condition or failure to perform the community service order. The overall effect of community service as a penalty for such offenders who would otherwise not have

received a custodial sentence was, as noted, to widen the net of social control (Cohen 1985) by prematurely introducing such offenders to custodial sanctions, when their offences and early criminal careers would not have warranted such early introduction to the penalty of "last resort" (Sparks 1971). Paradoxically, the selection of predominantly "shallow-end" offenders for community service, especially offenders with few or no previous convictions, may precipitate the incarceration of such offenders, while the cohort of "deep-end" offenders remains firmly within the custodial system without the opportunity of decarceration through such measures as community service (Scull 1977; Worrall 1992; Cohen 1985; Hylton 1981, McMahon 1990). The optimism which accompanied the introduction of Community service in England and Wales, especially the hope that Community service would herald a genuine alternative to custody and reduce the prison population was not to be fulfilled.

Young's study (1979) of six courts found that courts with a more severe sentencing practice made less use of community service orders when compared with other penalties selected for comparison. The existing sentiment of sentencers, whether lenient or severe, appears to have had a greater influence than any outside stated policy. In the courts which made greater use of imprisonment, within his study he speculated there would have been more scope for the use of community service as an alternative to custody. However, in general he reports the reverse was true.

In the survey of perceptions and practice among the Irish judges, the courts of summary jurisdiction were the courts which made most use of the community service order. This is also borne out by the statistical returns for community service in the District Court and the Circuit Criminal Courts. One judge of the Circuit Court indicated he would consider the use of the community service order much more often in the disposal of District Court appeals (which are heard in the Circuit Court) whereas he was much less inclined to use community service in the case of indictable offences on conviction in the Circuit Criminal Court:

> "I cannot think of any case in which I initiated one. I do accept them from theDistrict Court where the initial preparatory w normally use suspended conditions, that a person requires treatment, therapies and that they are more beneficial than actually a work situation". A5J1CC

Generally, the position of imprisonment, probation, the fine and conditional discharges are reasonably fixed in the sentencing scale to allow the court to select one penalty over another with a certain degree of predictability when dealing with an offender, upon conviction. However, the elastic nature of community service in England and Wales, which may be applied to a wide range of offences and circumstances, carries with it an inherent design fault which inhibits the use of community service as a specific measure of reducing the prison population, punishing offenders, making reparation to society or the re-integration of offenders.

The ambiguous position of community service in the sentencing scale in England and Wales appears destined to continue until some attempt is made to fix the penalty in the sentencing tariff. Both Pease (1985) and Young (1979) have firmly concluded that community service should be seen primarily as punishment thereby enabling some attempt to locate the penalty in the sentencing tariff. By designating community service merely as an imprisonable offence as opposed to a substitute for imprisonment in the legislation, the opportunity to limit the use of the penalty solely to custody cases was lost. Any subsequent attempt to direct the policy in favour of using community service only as a direct substitute for imprisonment whether by way of sentencing guidelines or Home Office Circulars to Magistrates may be effective only to the extent that they do not conflict with embedded sentencing attitudes (Young 1979). Once the penalty became established as an option within the sentencers' armoury, practices would prove difficult to shift with respect to the penalty whether these practices related to the bifurcatory selection process for offenders to serve community service, the calibration of hours to be served, the expected level of compliance with the order or the alternative penalty to be imposed upon breach (Young 1979; McIvor 1992; Pease 1980).

Any attempt to reposition the penalty within the punitive paradigm as a substitution for imprisonment would be likely to meet judicial resistance, as an interference with judicial independence and discretion (Young 1979; Carnie 1990). The plea to equity by Pease brought forward a suggestion for a two-tier community service scheme. In this arrangement the courts could make community service for non-custodial cases up to 120 hours but would be prohibited from imposing community service in excess of 120 hours with a maximum of 240 hours except for cases where custody was intended as a penalty. This suggestion has certain merit. However, the ability and propensity of sentencers to circumvent measures which seek to limit and control their discretion are well documented (Ashworth 1977) especially when measures are introduced to change already established practices.

In the survey part of this study, one of the judges who favoured decoupling the community service from any prior custodial requirement suggested:

> "…I would suggest that we should have extra gradations of sentence i.e. community service without the sentence hanging over it. … For example so many hours, maybe 60 hours would be the one without a sentence hanging over it or whatever". A4J1DC

While another suggested the courts sentencing function would be enhanced by such a measure by adding:

> "…I would also like to see a situation where for something like minor public order offences, that community service orders could be imposed which if they were complied with would lead to the effective cleaning of the record for that particular offence. Leaving the accused without any actual record of conviction". A2J1DC

Although courts may resist measures which seek to limit and control their discretion such as the requirement to combine the community service order with a custodial sentence in Ireland, these latter views might be interpreted as expanding the role of the Community Service Order into something which approximates more accurately the original idea of service to the community and forgiveness by that community.

CONCLUSION

Throughout this chapter the operationalization of the penalty of community service has been examined to discern which features of the community service order were best suited to the stated objectives of the penal policy underpinning the measure and which were not. The instrumental role of the Probation Service was critically examined including the discretionary practices and professional orientation of the field probation officer. The adoption by the Probation Service of the supervisory function of community service orders transformed a major aspect of the service from that of friend of the accused to one of penal agent of the court. This transformation occurred also at a time of professional reorientation of the Probation Service, when the era of penal welfarism was drawing to a close. While the theoretical underpinnings of the Probation Service were challenged by the "nothing works" movement, perhaps the same measure of criticism may be levied at the introduction and operationalization of community service orders. Did community service orders work? This issue was examined primarily against the criticism that community service should be seen to displace the prison sentence, thereby contributing to the reduction in the number of persons committed to prison. As noted, the rate of displacement from prison by the use of community service orders was 49% leading to the conclusion that community service missed the target by 51% if displacement from prison was the only or primary objective of the sanction. Moreover, by this standard, 51% of offenders were inappropriately sentenced and exposed to breach proceedings of a more punitive nature. The conclusions by Pease and Young that judicial entrenchment, which is not easily amenable to direction, may be a feature which would act as a counter-productive force when dealing with new penalties is an important insight for this study.

The effect of the new penalty on recidivism and criminal behaviour in general, was examined with conflicting results presented. Some community service schemes promote more optimal outcomes if the offender identifies with the work and is personally challenged by it.

The discretionary practices of the Probation Service featured again in the discussion on the need to introduce National Standards in 1989. Critical studies by Vass (1984) and Eysenck (1986) highlighted the elastic standards of different probation service agencies around England and Wales, where absenteeism was identified as unacceptably high in many schemes. The propensity to probationise community service orders by the probation officers may have had the effect of discouraging sentencers to use the sanction in a more expansive manner.

Certain essential factors have been identified which militate against the optimal effect of the community service order to operate as a thoroughgoing decarcerative device. The confusion which attended the original conception of community service and its purpose in the function of sentencing remained throughout the consultative, legislative and operational phases. Additionally, the propensity by sentencers to use the sanction to encompass offending which previously would have attracted a fine or probation and the entrenchment of such practices over decades significantly lessened the opportunity to provide a new sanction which would meet its stated objectives.

Thus ,the stage is now set to introduce the community service order in Ireland. The following chapter will examine the community service order in Ireland in light of the sanction established in England and Wales, with particular reference to the rationales underpinning the sanction. The views of the judges will be explored to critically examine the operation of the sanction in light of the policy objectives established for the sanction by the Oireachtas.

CHAPTER 3

"Laws, like houses, lean on one another" – Edmund Burke (1729-1797) Reflections on the Revolution in France (1790)

COMMUNITY SERVICE IN IRELAND A JOURNEY FROM NECESSITY TO DISCRETION

INTRODUCTION

This chapter sets out to explore how community service orders came to be established as a sanction in Irish sentencing law and practice. The pervading influence of administrative and legislative measures in the neighbouring jurisdiction of England and Wales will be discussed to illuminate how the sanction was established in that jurisdiction and subsequently transferred, as a sanction, to an Irish setting. The search for the rationale for introducing community service necessitates a thorough reading of the parliamentary debates in the Dail and Seanad (Senate) as well as official publications and reports which promoted the new penalty with differing emphases, varying in degree from the need to relieve prison overcrowding on the one hand, to a preference to use the setting of community as a place of punishment on the other.

As previously noted, a part of this study seeks to examine the role of the community service order in Ireland in light of judicial practices and perceptions where the sanction is designed to act primarily as a decarcerative instrument. However, the function of rehabilitation as an aim in Irish sentencing is also explored. The deterrent and rehabilitative aspects of imprisonment will be discussed, as will the role of other sanctions such as fines and probation with particular reference to the seeming reluctance of some sentencers to use such penalties more frequently. The direct economic costs of incarceration are explored to locate a rationale for the use of less expensive sanctions instead of custody which may not always be deemed necessary.

Certain local exigencies will be explored to explain the political and penal factors which influence the introduction of the sanction at a particular time, which factors, it will be seen

were also common to the deliberations of the English authorities when contemplating community service in that jurisdiction ten years earlier.

The chapter then moves on to examine the inception of the debate on the introduction of the community service as a new sentencing tool for sentencers, beginning with the publication of the White Paper in 1982. Thereafter a critical debate was conducted in the Oireachtas on the measure leading to the birth of the sanction under the legislation of 1983. The measure having been established in 1983, a number of critical questions presented about the operation of the community service order over the ensuing years.

The necessity to identify the target group of offenders for the new penalty requires particular attention to disclose whether the category given community service by the courts approximates to the same group intended to receive it by policy makers. A number of contemporary studies are used to explore the accuracy of this sentencing exercise, while the earlier identification of suitable offenders and offences for community service are compared. The chapter moves on to explore specific features of the community service order in Ireland as it operates in the District Court and the higher criminal courts with particular focus upon sentencing modalities of the different criminal courts and how the community service order is operated within these modalities. The relationship of community service to other penalties will be examined to ascertain whether the penalty is used in a manner consistent with its intended purpose, and if not, what dynamic features are operating in the sentencing field to deflect the penalty from its intended path.

PART 1

CONTINUITY AND CHANGE: A COLONIAL LEGACY

In Chapters 1 and 2 the emergence of the community service order as a modern penal sanction was discussed, particularly community service as introduced in the neighbouring jurisdiction of England and Wales in 1972 following the Wootton Report of 1970. The emergence and spread of community service as an alternative to imprisonment in other common law countries and civil jurisdictions (Menzies 1986, Vass and Menzies 1989, Leibrich 1985) was coterminous with the promotion of community service and other forms of non-custodial measures by the Council of Europe (Council of Europe 1976,

1986). Elements which were considered central to the successful introduction of community service in England and Wales, such as readily available placements alongside volunteer community workers were, in the main, absent in Ireland. However a preponderance of other factors and similarities (Kotsonouris 1993), particularly the influence of British penal practices, historical and contemporaneous, practically guaranteed the introduction of the penalty modelled, however loosely, on the community service introduced originally in England and Wales in 1971.[22]

Notwithstanding the legislative powers vested in the new Parliament in Dublin, following the establishment of the Irish Free State in 1922, the great bulk of legislative activity in the post-1922 period centred around the establishment of the machinery of the new emergent State, including the court system and procedures for executive government with Ministerial responsibility such as the Ministers and Secretaries Act 1927. Except in respect of newly enacted criminal laws directed towards the security of the State, the vast bulk of cases processed in the criminal courts in the new Free State and later in the Republic of Ireland (1949), ranging from murder to the most minor of offences, were tried under laws, whether under legislation or at common law, as if no change had occurred at the constitutional level on the establishment of the New State. Continuity in everyday life, from the old regime to the new, was reflected in the laws, structure and practices of the criminal justice system in the new State. Similarly, there was no departure of any significance from the criminal sanctions used by the Courts between the old and new regimes except for a brief period between 1920-1924 when Dail Courts established by the revolutionary government experimented with legal principles of the ancient Brehon System and European civil law systems (Kotsonouris 1993).[23] A remarkable feature of this legacy was that upon the establishment of the Irish Free State, the new State adopted the previous criminal laws applicable to the jurisdiction, thereby ensuring continuity between the old

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[22] In the 19th Century the positivist ideas emerging from the physical sciences and the spirit of the age which were accompanied by the sustained economic growth in the United Kingdom, which since the Act of Union of 1800 included the island of Ireland, a parallel rationalisation of the Criminal Law substantively and procedurally was brought about by a series of Criminal Law Statutes relating to offences against the person, malicious damage to property, larceny and the organisation of the Courts. Similarly, the penalties of fines and imprisonment emerged during the 19th Century as the everyday penalties in the criminal courts in Ireland as a result of these legislative measures. The influence of British penal measures on the Irish criminal justice system during this period is most obviously explained by the centralised nature of law-making and administration based at Westminster during the period from the Act of Union 1800 to 1922 when the Oireachtas (Dail and Seanad) took up the function of law-making and the administration of the criminal justice system was transferred to Dublin, save for those functions already delegated and performed within Ireland.

23 This latter experiment was pragmatically abandoned on the foundation of the Irish Free State in favour of continuity with the criminal justice system identical with the previous regime, except for cosmetic aspects such as uniforms, emblems and language.

and new regimes. This led to the anomaly that some criminal legislation which was common to both jurisdictions of Ireland and England and Wales was repealed in the latter jurisdiction but continues to have full force of law in Ireland, for example, the Probation of Offenders Act 1907.

Following independence, a series of legislative measures were passed by the Oireachtas in relation to diverse areas of economic and social life such as the regulation of company and commercial affairs, road traffic legislation dealing with drunk driving and motor insurance, the protection of spouses and children from domestic violence and provision for family maintenance, as well as criminal justice legislation relating to the regulation of public order. The genesis of many of these legislative measures can be traced to a significant degree to the laws passed in the Parliament at Westminster since Irish legislative independence in 1922. An example of this legislative transference is the community service order introduced under the Criminal Justice (Community Service) Act 1983 which is closely modelled on the Criminal Justice Act 1972 which introduced community service orders originally in England and Wales (O'Mahoney 2002:6).

Despite claims to the contrary by Ministers and Parliamentarians as to the outside influences which preceded the introduction of community service in Ireland, the adoption of the community service scheme in England and Wales by the Irish legislature was but one of a continuous sequence of legislative transferences from the former imperial jurisdiction to an Irish setting. There were distinct advantages to this process for the recipient jurisdiction. In particular, legislative measures initiated in the host jurisdiction were usually examined in great detail through consultation and debate. Thus the efficacy of such measures was tested in advance of transference. Moreover, legislative measures which touched upon sentencing in particular allowed for an easy transference to a jurisdiction which was culturally and socially quite similar.[24]

It could be argued that the adoption of legislative measures from one state to another reflects a standardisation of approach to tackling certain issues as if these issues were easily amenable to uniform and mechanical resolution. Earlier transferences of penal technology such as the prison to other jurisdictions did not necessarily depend upon a colonial

24Criminal Justice Act 2006 SS.113-117. This relates to the introduction of so called ASBOs by way of an amendment to the Children Act 2001 and related legislation.24 The purpose of this proposal is to deal by way of civil orders with incidents of anti-social behaviour particularly in relation to juveniles. The pattern of legislative transference is well established and continues as we have seen in the case of anti-social behaviour orders to the present day.

relationship between the host and recipient jurisdiction. Rather, the rationalised approach to punishment facilitated the use of similar type institutions across jurisdictions with similar cultural settings. Western culture is firmly based upon the approach of rationality which structures every aspect of life in terms of a duality of positive or negative, right or wrong and as we move into the digital age one or zero. When one examines the hard physical sciences one observes immediately that scientific propositions must be true for all places irrespective of country or jurisdiction. But it might also be observed in other areas of life outside of the physical sciences, that rationalisation has taken firm root in the use of bureaucracies (Weber 1976) and pervasively in the services sectors of economies. Ritzer's (2000) example of globalised provision of fast food through the McDonald's franchise system furnishes a challenging example of the application of the rationalization of society and culture.[25]

There is always a danger when legislative measures are taken much in the same way as a technology and transferred to a new setting, that the technology may not quite suit the circumstances of the recipient jurisdiction (Freiberg 2001). As will be revealed in this chapter and the following chapter, certain difficulties presented in the adoption of the scheme for community service in England and Wales when it was adapted for Irish conditions. However, notwithstanding frictional differences in such policy transference, many such legislative measures, such as drunk driving regulation and domestic violence legislation could be applied in many Western jurisdictions as if the measures were pre-packaged and made available "off the shelf".

Although Jones and Newburn (2007) demonstrate that international policy transfer in the criminal justice field primarily manifests itself within the recipient jurisdiction at the "soft" end of the spectrum of ideals, rhetoric and symbolism any attempt at a "hard transfer" of pre-packaged criminal justice measures is rare and subject to complexity and

25 A McDonaldized society is based upon four features which Weber identified in his earlier description of the bureaucratization of society. These essential and common features require that the project is capable of a maximum efficiency, calculability, predictability and control. Ritzer's example of McDonald's patrons acting as part of the enterprise by clearing tables suggest the patrons identify with and are culturally assimilated into it. The advent of the McDonald's culture to the USSR during Glasnost was initially regarded in the West with some degree of amusement, but it was also regarded as part of a normalisation process. In the post-communist era the Eastern Bloc countries have embraced the market economy, arguably the purist form of rationalised society, with enthusiasm. Ritzer's example of the rationalisation, represented by McDonald's fast food chain, is but one example of the construction of a technology whether administrative (Weber 1976), commercial (Ritzer 2000) or socio-economic whose constant feature is the durability of a rationalised system as it is applied from one setting to another.

unpredictability. It is argued in this study that the form of community service introduced in Ireland in 1983 was almost identical to the earlier form used in England and Wales except for one important difference relating to the precondition that an actual custodial sentence would be the sentence of choice if community service was not available as a legal sanction. In all other respects the penal policy transfer was an almost complete emulation of the English legislation.[26] This included a similar number of hours to be served, the issue of consent and the provision of pre-sentence suitability reports. Such is the degree of conformity with the English model that certain sections in the Irish legislation use the exact same phrases and wording, leading, it will be demonstrated, to certain anomalies in the Irish community service arrangement.

In the debate on the Criminal Justice Community Service Bill 1983, Deputy Kelly chided the Minister for Justice for slavishly copying British legislation without first conducting appropriate research specific to Irish criminal behaviour when he said:

> "we rely on English textbooks as though the patterns of social existence and the criminality that goes with them are likely to be the same in Macclesfield as they are in Bangor Erris" (Dail Debates, vol. 342, col. 173, 3rd May 1983).

The debate on the measure in the Dail was greeted with a marked degree of scepticism by a number of deputies, while in the Senate the measure was examined discretely and in isolation from other pressing criminal justice issues, which complicated the debate in the Lower House. In the Senate the idea of community service was welcomed as a timely alternative to unnecessary custodial sentences.

LOCAL EXIGENCIES: CONTEXT AND FACTORS WHICH INFLUENCED THE INTRODUCTION OF COMMUNITY SERVICE IN IRELAND.

INTRODUCTION

The criminal justice and penal systems inherited from the British administration in Ireland continued unchanged for much of the 20th Century. Occasionally when a new criminal

26 The English scheme (Section 15 Criminal Justice Act 1972) provided that an offender must be 17 years or more before a community service order could be imposed whereas the Irish scheme set the minimum age at 16 years. In 1982 legislative provision was made in England and Wales (Criminal Justice Act 1982) to allow for community service sentences for sixteen year olds but the maximum number of hours was capped at 120 hours for this category i.e. sixteen year olds. Additionally the English scheme presumed significant involvement of the voluntary sector which was not developed to the same extent in Ireland.

justice measure from Britain was identified by Irish policy makers as appropriate for Irish conditions the assimilation of such a measure into Irish Law was brought about without too much debate.

The adoption of community service orders in Irish penal policy is a prime example of the transference of legislative measures from the U.K. to Ireland in the long tradition of legislative cross-fertilization (O'Mahony 2002: 6).[27] Besides this over-arching legislative influence emanating from the Parliament at Westminster clearly the adoption of community service into Ireland could not have come about without the confluence of a series of factors which made community service a proposal just ripe for introduction in Ireland in the early 1980s (Jennings 1990). In particular the rapid economic and social changes in Irish life, which accompanied economic development in the 1960s, saw the beginning of significant increases in the crime rate and the reception of increasingly more prisoners into custody. Initially this change in the crime rate was explained by crimes of economic opportunism (Rottman 1980) but as the 1970s unfolded so too did the spread of drug addictions, particularly heroin addiction among a large cohort of recidivist offenders. Not surprisingly, the crime rate among this group of offenders (Chiaken and Chiaken 1990)[28] increased significantly, particularly in relation to predatory crime. In the section below the factors which influenced the introduction of community service in Ireland are examined in greater detail.

1. The Crime Rate Increase

Overall, the crime rate increased four-fold from 1968 to 1981. The total number of indictable crimes recorded increased from 23,104 in 1968 to 62,946 in 1977 (Report on Crime 1977:3) to 89,400 in 1981 (Report on Crime 1981:3). These figures do not however accurately reflect the overall crime rates during the periods mentioned as the vast bulk of summary offences triable in the District Court are not reflected in these figures, nor are the hybrid offences which are tried summarily but which could at the election of the D.P.P. be tried on indictment, such as possession of drugs for the purposes of sale or supply (Section

27 More recently a new trend has emerged where some Irish legislative measures such as the procedures for confiscation of assets acquired as a result of illegal activity, which was pioneered in the Republic of Ireland under the Criminal Assets Bureau Act 1996 has been exported as a legislative idea to Northern Ireland and Britain.

28 Predatory crime was found to be significantly elevated in the cohort of active opiate users by Chiaken and Chiaken 1990 in the U.S.

15 Misuse of Drugs Act 1977) and offences relating to the unlawful taking of motor vehicles (Section 112 Road Traffic Act 1961).

It is important to note that recidivist offenders who were sentenced to imprisonment for short periods on conviction, for small scale crimes of larceny and criminal damage combined, took up a highly disproportionate number of prison places in conjunction with another group of offenders who were sentenced to prison perhaps for the first time for relatively minor offences (McBride 1982:46-50). The prison system was accordingly weighed down with offenders serving short terms of imprisonment imposed by the District Courts. When the matter was discussed in the Dail during the debate on the Criminal Justice (Community Service) Bill the Minister for Justice, Mr Noonan, had considerable difficulty focusing attention on the specific measure of community service, so great was the agitation on all sides of the House with the "crime-wave" which was allegedly "sweeping the Country". Dr. Woods T.D. spoke of "a breakdown of law and order of unprecedented proportions" (Dail Debates vol. 341, col. 1337, 20th April, 1983).

The Minister for Justice while acknowledging the Deputy's concerns relating to the increase in the crime-rate and in particular the commission of offences by offenders while on bail and early release sought to focus the debate on Community service thus:

> "Some Deputies criticised this Bill as the solution to the crime problem, but it was never put forward in that context. I see it as only one instalment in a series of activities which must be taken quickly if we are to combat the very serious crime situation facing us." (Dail Debates vol. 342, col. 319, 4th May, 1983)

It may be observed that the minister was focused upon community service as a method of easing prison overcrowding while the deputies were more exercised with the perceived growth in criminality in general. The minister described the introduction of community service as but one instalment in any "solution" to the problem of the growth in crime.

2. Prison Overcrowding

The increase in the crime rates was quickly reflected in increased rates of incarceration of offenders by courts particularly by way of short-term imprisonment for relatively petty

offences by recidivist offenders.[29] The level of confidence by sentencers in the penalty of the fine may also have provided an upward pressure on the number of persons committed to prison for short sentences.[30]

In addition to the increase in the prison population, by virtue of a large number of short-term prisoners continuously passing through the prison system, further pressure was added to the crisis by the increase in the length of imprisonment for the average person sentenced (N.E.S.C. Report 1984). So, more prisoners were entering the prison system and were committed for longer periods than heretofore.

The prisons in use in Ireland in the early 1980s, when community service was introduced, were built in the 19th Century and one prison at Portlaoise was exclusively used for offenders committed to prison for serious paramilitary offences on conviction by the Special Criminal Court. Accordingly for a period since 1973 to 1984 when community service was introduced, one entire prison was removed from the prison system for paramilitary offenders and was accordingly not available for ordinary offenders.

From 1960 to 1982 there was a 200 percent increase in the Irish prison population. The use of administrative procedures under the Criminal Justice Act 1960 allowed significant leeway to the Minister for Justice to shed large numbers of prisoners from committal by way of holiday breaks and especially by use of early release of such offenders. Specifically in 1982, 624 prisoners were given full temporary release under the supervision of the Probation Service, 1,631 were given temporary release without supervision, 1,298 of them specifically to allow the intake of more recent committals from the courts (Dail Debates

29 Although in England and Wales the crime rate and subsequently the number of persons convicted by courts for offences increased, the number of persons given custodial sentences in relative terms compared with fines and other non-custodial sanctions such as probation, did not. However, the number of persons given custodial penalties in absolute terms did certainly increase (Bottoms 1983) a similar pattern also held true for Ireland.

30 The practice of petitioning the executive for clemency against fines emerged as a counter-veiling factor in the 1980s against the use of fines by courts. The number of petitions for clemency against fines, usually facilitated through Oireachtas representatives (TDs and Senators), amounted to almost a parallel system of justice where the executive rather than judicial authority prevailed in sentencing as far as fines were concerned. It is difficult to assess the extent to which courts may have been reluctant to use the fines system as an alternative to custody in light of the widespread use of the petition system up to 1995 when the system was much curtailed as a result of the decision in Patrick Brennan –v- Minister for Justice [1995] 1I.R. 612. In that case a Judge of the District Court was aggrieved at the extent to which the Minister for Justice exercised clemency on fines imposed by him. The High Court upheld the power of commutation by the executive through the Minister for Justice but stressed that the use of the petition system should be sparingly used for the rarest of cases and not as an everyday procedure for the forgiveness of fines properly imposed by a criminal court. In addition to the overuse of the petition system, there may equally have been concerns among sentencers about the collection and enforcement of fines by the authorities usually An Garda Siochana. Subsequent to the introduction of community service in Ireland, a Report by the Comptroller and Auditor General found considerable under-collection of fines from offenders, the effect of which would significantly undo the sentencing aim originally intended whether punitive or deterrent. The extent to which these latter factors influenced the use of the fine as a penalty by sentencers, prior to the introduction of community service in Ireland must remain speculative, but the writer from professional experience and from personal contacts with Judges regards the issue as influential upon the extent to which fines were and are used as alternatives to custody.

1983: Vol. 101-341). The Minister for Justice specifically addressed the issue in the debate on the Criminal Justice Community Service Bill as follows:

> "The shedding from prisons is bringing the law into disrepute. It is dispiriting the Garda. It is making the general public extremely anxious about the capability of our society to fight against crime. I see this (community service) as a major first instalment in reducing pressure on prison space". (Dail Debates, vol. 342, col. 322, 4th May, 1983, Mr M. Noonan)

The relief of prison over-crowding therefore must be seen as central to any policy decision to introduce community service in Ireland at that time, but interestingly the use of other non-custodial measures such as suspended sentences and fines available to sentencers prior to the introduction of community service, did not feature to any significant degree, as appropriate alternatives to prison, during the debates. The introduction of community service was by and large presented and debated as an alternative to prison only and as a measure to relieve prison over-crowding. Deputy Shatter however saw a role for the penalty, both as an alternative to custody and as an intermediate non-custodial penalty in its own right when he said:

> "I would like to see the Courts having the options of community service available where persons are convicted of offences, whether or not the Judges believe that imprisonment is appropriate. The legislation must clearly state that, where a custodial sentence would be appropriate, community service orders are available as an option. I can think of many instances where young people in their late teens have come before the Courts on a first or second offence and Judges who were reluctant to send them to prison have said they will give them a chance. They have given them the Probation Act and within a matter of weeks they are back before the Courts again. Getting off under the Probation Act is seen by many offenders as what it is, simply getting off. It is not a deterrent and it is seen by people as an easy option. In those circumstances the option of community service should be available and would be seen as appropriate by many people who were familiar with the Courts. It would not be seen as an easy option by many offenders and it would instil in them the type of responsibility that would be lacking and prove a deterrent from committing crimes again. I would urge the Minister to extend this legislation

beyond the area of offenders for whom a Judge believes imprisonment would be appropriate." (Dail Debates vol. 342, col. 310-311, 4th May 1983, Deputy Shatter).

As will be seen, Deputy Shatter's suggestion to use community service more extensively as a sanction was not acceptable to the Minister. Despite a series of amendments to use the sanction more widely the Minister positioned the sanction to perform one primary function namely to ease prison overcrowding. Thus the sanction was to be used only as an alternative to a custodial sentence and not in substitution for any other form of penalty.

3. Rehabilitation not working in Irish Prisons and Offered by Community Service

The extent to which rehabilitation was ever a stated aim of Irish prison policy is reflected in the Report on Prison and Places of Detention (1981) where rehabilitation as an aim of penal policy was clearly qualified and presented as secondary to security. The primary aim of the prison system was to contain offenders securely. However, it was obligatory upon the prison service to provide such facilities for an offender for his "self-improvement" which might help him to turn away from a life of crime "if he so wishes" (Report on Prison and Places of Detention (1981:29).

In Irish sentencing law the rehabilitation of the offender is considered one of the primary aims of any sentence. The realisation of that rehabilitation through executive agencies of the state may not always be achieved. In People (Attorney General) –v – O'Driscoll (1972) Frewen – Court of Criminal Appeal 351, Walsh J. stated that "one of the objects of sentencing was to induce the criminal to turn to an honest life". In another part of the judgment reference is made to the possibility of the accused's "redemption" from a life of crime. Such redemption, to use such a quasi-religious term, might best be achieved through rehabilitation whether in a custodial or non-custodial setting. However, the rehabilitative programmes in the Irish prison system have always been challenged by counter-veiling factors such as the lack of facilities, resources and chronic over-crowding in cells. In Mountjoy Prison Dublin, the use of heroin by inmates was so widespread it was necessary to create a drug-free area for inmates who wished to be separated from such influences and this was located in the training unit of the prison.

It would be incorrect to assume that the Irish prison system immediately prior to the introduction of community service operated on the classic lines of penal welfarism as identified by Garland (2001) in the U.S. and in England and Wales up to the early 1970s.

The Irish Probation Service was completely underdeveloped before 1970, as previously noted, with no Probation Officer outside of Dublin (Kilcommins *et al* 2004: 52). Crucially, the sentencing aims expounded by the Court of Criminal Appeal in *O'Driscoll*, while expressing clearly what the object of sentencing might be, failed to identify a suitable vehicle within the penal system to facilitate the redemption or rehabilitation of the offender. If the Court of Criminal Appeal intended the use of the term "redeem" in a purely religious sense the prison service did provide the chaplaincy service which in certain individual cases may have achieved the desired change in the offender. However, for the prison population as a whole the high rates of recidivism would appear to suggest that the desired incidence of redemption in offenders as envisaged by the Court of Criminal Appeal did not come about.

If the term redeem as used by the Court of Criminal Appeal was intended to mean a facilitated rehabilitation through an agency of the State such as the Prison Service then the Courts were effectively asked to sentence in a vacuum by reference to facilities or programmes which did not exist. As previously mentioned the effectiveness of a fine is negated by the non-collection of that fine and indeed the knowledge by an offender that a fine is unlikely to be collected at all. Young suggests it only makes sense to discuss the philosophical bases of a sentence in terms of the aims for which it is imposed (Young 1979; 34). The stated aim of imprisonment in the Report on Prisons and Places of Detention (1981) as mentioned was "to contain offenders". This in many respects runs counter to the stated aim of sentencing by the Court of Criminal Appeal in *O'Driscoll* to allow the accused a chance of redemption.[31]

Internationally, the rehabilitative function of the prison was under critical challenge since the mid-1970s particularly the use of rehabilitative programmes for prisoners with indeterminate sentences (Martinson 1974). In the U.K., the Report on the Prison Service (1979) states that the purpose of imprisonment was to provide a place of custody which was secure but which would also provide such vocational facilities to make incarceration tolerable.

The influence of the Wootton Report on official deliberations in Ireland prior to the introduction of community service strongly suggested that community service would

31 The extent to which Irish courts at present give prominence to rehabilitation as an aim of sentencing may have shifted a number of degrees in favour of proportionate sentences which include rehabilitation but also include elements of desert and avoidance of risk.

provide a significant element of rehabilitation for offenders. The presence of rehabilitation as a component of community service was regarded by the Irish Probation Service Officers as an essential link to the core social work ethos under which they had operated for the preceding fourteen years since their first major expansion (Halton 2007). The idea that rehabilitation work would continue into the new function of community service schemes facilitated acceptance by the service to operate the new non-custodial measure (Jennings 1990). However, in the practical working out of community service by the Probation Service in Ireland divergent practices within the service over time are seen to emerge, some of which suggest that the probation officer was increasingly adopting the role of penal agent in enforcing the procedures of community service orders while the rehabilitative function receded in practice (Halton 2007).

4. The Cost of Incarceration

Baroness Wootton's report in 1977 in respect of community service that "at least it's cheaper" must have registered significantly with Irish prison policy makers in the early 1980s, during a time of economic crisis, due to significant oil price rises, rampant inflation at c.17% and an embargo on public service recruitment. Indeed the cost of maintaining a creaking Irish prison system was so severe on the public purse that policy choices were severely restricted (NESC Report 1984) except for the policy of shedding prisoners on temporary release on a daily basis to allow for the intake of new committals.

The Minister for Justice when speaking on the comparative costs of community service and that of imprisonment suggested that an offender on community service would cost £18 per week whereas the cost of keeping the same offender in prison would amount to £424 per week (Senate Debate, vol. 101, col. 867, 7th July 1983, Mr Noonan). While the Minister was quick to add that he did not want to give the impression that this was why the measure was being proposed, the economic argument undoubtedly was a very significant factor at that time (Jennings 1990). The cost of maintaining a prisoner at £424 per week in 1983 was indeed "a frightening one" (Senate Debate vol. 101, col. 867, 7th July 1983, Mr Noonan) but the potential cost of incarcerating increasing numbers of prisoners brought forward an even more frightening figure when capital costs for new prisons might be added to the static figure of £424 per week to simply maintain a prisoner within the prison infrastructure already described.

In retrospect the estimated cost of maintaining an offender on a community service order for merely £18 per week provided a very attractive political aspect to the desirability of using such non-custodial sanctions wherever possible. In the White Paper which preceded the Oireachtas Debates (Community Service Orders 1981) while administration costs are anticipated such as extra probation and welfare staff, supervisors, protective clothing and travel expenses the hidden but real cost of breach procedures and incarceration of ultimate defaulters on community service were not factored in, to give a more accurate cost of community service (Community Service Orders 1981 par. 37). This econometric exercise was finally to be provided by the Comptroller and Auditor General Report on Value for Money Examination on the Probation Service in January 2004 (C & AG Report 2004) when the true comparative costs of community service orders relative to incarceration were revealed. Generally, the report found that a community service order cost thirty-one percent of the cost of the alternative imprisonment, controlling for time to be served (C & AG Report 2004 p.49).[32] If the Auditor General's estimate is retrospectively applied to the weekly cost of imprisonment in 1983 the true cost would have amounted to £131 and not £18 per week as claimed by the Minister for Justice. This more sobering figure might have given the nay-sayers in the Dail a greater point of leverage when discussing the merits of community service as an alternative to custody had such information been available (Mr Kelly, Mr Gahan, Dr. Woods Dail Debates vol. 342 4th May 1983).

5. Humanitarian Concerns Limiting the Use of Imprisonment

Besides the pressing policy concerns implicit in the ever increasing prison population, a number of reports portrayed the typical prison inmate as coming from very specific neighbourhoods where social deprivation, early school-leaving and drug addiction were endemic. Typically the average prisoner, identified in later studies, had left school early, was male and lived at home with his parents or was homeless (Simon Community 1984; O'Mahony and Gilmore 1981). The use of imprisonment was recognised as the "dust bin" for society's problems some of which were otherwise health problems such as addictions and attenuated mental health issues. The use of the prison to contain such

32 More recently, a value for money analysis of community service and the cost of imprisonment was conducted by Petrus Consulting on behalf of the Department of Justice, Equality and Law Reform in which the writer was engaged in a consultative capacity on the supervisory board. The report found that the average cost of a community service order was €4,295 (a total of 1158 orders were made for 2006). The alternative cost for incarceration when adjusted was €27,478. The report concluded that community service costs approximately 15.6% of the alternative cost of imprisonment. (Petrus VFM Report 2009:72)

problems was seen as wholly inappropriate, especially as the prison conditions deteriorated with further over-crowding. Deputy Keating identified the negative labelling aspect of imprisonment in the debate when he said;

> "A prison sentence ruins a person …in many cases it is a sentence of death in terms of a person's development, fulfilment, career and family" (Dail Debates vol. 341, col. 1358, 20th April, 1983).

Moreover the premature use of imprisonment in an offender's career was recognised as accelerating the offender into the path of criminality, which projection could best be avoided by diverting the offender away from the learning patterns of prison life (Tuck 1988:5; Sykes: 1958; Lemert: 1951).

However, the use of community service for offenders with addictions was to present as a significant issue once the community service schemes were established in Ireland. Community service orders were contra-indicated in community service suitability reports where the offender had an active addiction as the offender would present a risk to himself or to co-workers which would not be covered by occupational insurance, a necessary precondition to the establishment of any community service scheme. So, in reality while prison may have been considered inappropriate for such offenders, they were almost automatically excluded from the non-custodial penalty of community service by virtue of their deemed instability due to drug misuse.

6. Deterrence Not Working

The specific deterrent effect of imprisonment was demonstrably not working for the majority of prisoners as was evidenced by the Report on Prisons and Places of Detention in 1981, the most recent report available when the Criminal Justice (Community Service) Bill was debated in the Oireachtas. Fifty Eight per cent of males and 41% of females sentenced in 1979 had been in prison before. Twenty-five percent of males and eighteen percent of females had served one to five previous terms. Thirty-four percent of males and twenty-three percent of females had served five to twenty previous sentences and nine to ten percent of both sexes had been "inside" more than twenty times. (MacBride 1982:46-50) The N.E.S.C. Report (1984:160) indicated two thirds of adult males

sentenced had a record of earlier imprisonment. Forty two per cent of those imprisoned during 1981 had a record of 4 or more imprisonments while 55% of females sentenced in 1981 had served 1 or more earlier sentences (NESC 1984:160). Moreover, the experience learned by the prisoners of early release may have diluted significantly any special or deterrent effect especially in relation to female offenders who received early release more quickly due to the scarcity of prison accommodation.

The perception that prison has ceased to have a deterrent effect was borne out by the studies above. The extent to which community service would act as an agent of change in the behaviour of the offender was promoted in the White Paper and reflected in the Oireachtas debates. The introduction of any new sanction is usually accompanied by a sense of optimism that finally a useful sanction has been devised which will make a significant difference where others have failed. As recidivist rates for community service were perforce unknown, this required a certain leap of faith that community service would reduce offending behaviour.

7. Community as a Location for Punishment

The White Paper (1981) in keeping with the Wootton Report (1970), suggested the advantages of maintaining an offender in employment with a minimum disruption of family life and away from the corrosive influence of habitual offenders was far more preferable as a setting for the imposition of a penalty than imprisonment. Moreover, the community would benefit from such work done by persons sentenced to community service which would not otherwise be done (White Paper 1981: par. 7). Some experience of prisoners working on community projects had already been gained in the Irish prison system and the results were deemed positive both for the community and for prisoners alike. Moreover, public sentiment, influenced by media coverage and by publications such as *Crime and Punishment* (MacBride 1982) increasingly questioned the necessity to incarcerate a large number of prisoners who might otherwise be capable of serving their sentence in a community setting. Public sentiment, insofar as it could be considered a true reflection of community attitudes, was receptive of the possibility that certain offenders might be suitable to serve out a sentence within a community setting. The extent to which this tolerance would extend to medium to serious offending was tested by certain views expressed in the Dail Debates by Deputy Gahan and Deputy Tunny who spoke of the

softly softly approach adopted in the Bill where imprisonment might in their view be more preferable. Deputy Gahan expressed it thus:

> "we need more jails, we need a jail in every county" (Dail Debates, vol. 341, cols. 1946-1947, 26th April, 1983)

Deputy Tunny criticised Community Service as:

> "… a step further in making apologies for those found guilty of offences" (Dail Debates, vol. 342, cols 152-153, 3rd May, 1983).

Although Jennings (1990) cites the demands for sterner penalties as a factor influencing the introduction of community service in Ireland, community service as structured under the Criminal Justice (Community Service) Act 1983 required that community service could not be imposed except in lieu of a term of imprisonment which would otherwise have been imposed but for the provision allowing for community service. In the circumstances, the somewhat shrill complaints in the Dail, but not in the Senate, for sterner penalties might be considered more a criticism of the perceived leniency on the part of the Courts when dealing with offenders, rather than an argument against the introduction of community service.

The list of examples of Community Service tasks set out in the Appendix to the White Paper (1981) ranged from personal service by an offender in helping in children's homes, youth clubs, elderly people's homes, handicapped and disabled persons social activities to other practical help to the community such as building, painting and decorating work for the elderly, youth groups and community groups. These tasks would not have been done at all but for the provision of community service. In this way the community would receive a positive benefit from the offender and the offender would be afforded an opportunity to make reparation, if not to the victim of his/her offence, then to the community as a surrogate. The promotion of alternatives to custody in a programmatic approach within the Council of Europe was a significant influence upon the policy approach taken by the Department of Justice in bringing forward proposals in the White Paper in 1981 according to Jennings (1990). Senior Civil Servants and Ministers attending meetings of the Council which were targeted at such measures were influenced by the new approach taken in Europe (Cooney 1976: 10).

The experience of the Probation Service in dealing with offenders under the intensive probation schemes since 1979 specifically for offenders sentenced for serious offences in the Circuit and Central Criminal Courts highlighted the fact that there was a sizeable number of offenders who did not require to be kept in custody and could be maintained in the community under strict conditions without re-offending (Jennings 1990).

As previously mentioned, the vast bulk of prisoners were committed to prison for offences of a minor nature by the District Court. The desirability of dealing with these shallow-end offenders under a community based penalty was all the more feasible in light of the experience in dealing with medium to deep-end offenders in community based Intensive Probation Schemes. As the Minister for Justice put it in the Dail, the aim of Community Service is "to keep out of prison offenders for whom custody is not essential" (Dail Debates vol. 341, col. 131, 20th April, 1983, Mr Noonan).

These several factors referred to above, provided the primary vectors which resulted in the introduction of community service in Ireland. Some of these factors were pragmatically based, especially the issue of prison over-crowding and the imminent necessity to expend huge capital and revenue resources in the building of new prisons. The economic and fiscal climate in the early 1980s was incomparable in its austerity when compared with the latter-day celtic-tiger economy. The function of the community service order as a diversion from custody must be understood primarily as a solution to this pragmatic issue. Additionally, the use of custody by the courts was considered inappropriate for a large number of cases, especially cases where a sentence of relatively short duration was imposed. These very same short sentences acted as a major strain on prison accommodation and resources. Besides the pragmatic issues of resources and their uses, a certain change in sentiment emerged based upon observations that prison use achieved very little by way of deterrence or rehabilitation of the offender. The growth in the crime rate and the seeming inability of the prison system to sufficiently deter further offending alarmed many Deputies in Dail Eireann. The positive feature of community service such as restitution and rehabilitation were promoted as dynamic features of change in the behaviour of offenders in contrast to the static and limited results of custodial sentences. The venue for making such restitution was clearly identified in a community setting where the offender might also come to appreciate, by working with others, the values of the community and assimilate these values as his/her own.

Thus the stage was set for something to happen. Community service had been used as a sentence in England and Wales for the preceding ten years and the results seemed promising.

FROM THE WHITE PAPER TO LEGISLATION: CONSIDERATION OF COMMUNITY SERVICE IN THE LEGISLATIVE PROCESS

The White Paper

The formal debate on the idea of using work in the community as a penalty was commenced by the publication of a Government White Paper entitled "Community Service Orders" which was laid before both houses of the Oireachtas in June 1981 (CSO 1981). Generally speaking, it is unusual to have a White Paper published in advance of legislation except for social and economic measures which significantly change the orientation and methods of dealing with sensitive issues such as the administration of the health services (Health Act 1970), the Education Services (Education Act 1998) and the administration of the public service "Serving the Country Better" (1985). In this regard Jennings (1990) argues that the publication of a White Paper in advance of the Criminal Justice (Community Service) Bill 1983 signified a certain apprehension on the part of the Department of Justice and the Minister for Justice about how the idea of punishment in the community would be received by voluntary organisations and the Trade Union Movement. Specifically, the White Paper stated that:

> The co-operation of Trades Unions would be necessary for the success of the Scheme and consultations will take place with their representatives (CSO 1981:par. 38).

The fine line between remunerated work and work which the White Paper classified as work which would not otherwise be done (CSO1981:par.7(b)) was clearly a sensitive issue between Government and the Trade Union Movement when unemployment rates were running extremely high. In the event, the Irish Congress of Trade Unions welcomed the decision to introduce community service orders subject to procedures to be worked out between the Trade Union Movement and the Probation Service to implement the measure without damaging the interests of paid employees or potentially paid employees (Jennings 1990).

The experience gleaned from a small number of work in the community schemes for prisoners released on a daily basis from prison was highlighted in the White Paper as an example of the type of successful measure which could be used in the disposal of criminal convictions by the courts:

> While the number of prisoners employed on the scheme is relatively small in the context of the total prison population, the scheme has nonetheless proved successful – success in this regard being measured by the effect/involvement in the scheme has had on the prisoners engaged on it, by the standard of the work which has been done and by the reaction of the various local communities for whom projects have been completed. (CSO 1981: par. 2).

The White Paper sought to extend the scope of the work in the community schemes for prisoners, which would not necessitate the initial incarceration of such prisoners provided such offenders were suitable to do such work (CSO 1981: par. 3). It is interesting to note in the subsequent debate in the Dail both Deputies Kelly and Shatter criticised the delay in transferring "self-obvious" penal technology from the neighbouring jurisdiction of England and Wales to an Irish setting.

> I agree to some extent with my constituency colleague, Deputy John Kelly who yesterday referred to the fact that it is very difficult to understand why a Bill of this nature has been in force across the water for over ten years and it has taken us until now to deal with this particular problem and provide for this type of Bill (Dail Debates, vol. 342, col. 307, 4th May, 1983, Deputy Shatter).

However, the delay in transferring the "readymade" sanction of community service to the Irish jurisdiction may have provided benefits which could not have been achieved without the research and analysis of the Home Office and in the academic community in the United Kingdom and elsewhere on the optimal use of community service as an instrument of decarceration (Scull 1977). The Minister for Justice when speaking on the second stage of the Criminal Justice (Community Service) Bill 1983 readily acknowledged that "the opportunity has been taken to improve where possible, in the light of British experience" a model for community service in Ireland (Dail Debates vol. 341. col. 1331, 20th April, 1983).

The White Paper set out a series of what it termed "the effects of orders" as follows:

> Community service orders can be seen from several viewpoints: either as a more positive and less expensive alternative to custodial sentences; as introducing into the penal system an additional dimension which stresses atonement to the community for the offence committed; or as having psychological value in bringing offenders into close contact with those members of the community who are most in need of help and support. To some, it might appear to have a symbolically retributive value. Thus although the Court order, which would deprive the offender of his leisure time and require him to do work for the community, would necessarily involve a punitive element, it would also provide an opportunity to the offender to engage in personal service to the community and this might in turn lead to a changed attitude and outlook on his part. A central feature of community service work is that it would be work which otherwise be left undone and that it would be of benefit to the community (CSO 1981: par. 5).

The proposals in the White Paper were essentially carried forward into the Criminal Justice (Community Service) Bill 1983, and ultimately enacted into the Criminal Justice (Community Service) Act, 1983. Although the White Paper was a consultative document, the response to it was described as disappointing by the Minister, except submissions from the vocational bodies representing the probation officers, the Prison Officers Association and the Irish Congress of Trade Unions. The Bill as presented was passed into law and the Minister refused to accept a series of proposed amendments.

Dail and Seanad Debates

The Criminal Justice (Community Service) Bill 1983 was initiated in the Dail on 13th April, 1983 which Bill was preceded by two similar Bills, one a Private Member's Bill in the name of Deputy Alan Shatter and a Government Bill introduced by the Minister for Justice, Mr Doherty in the previous Dail which Bills had lapsed on the dissolution of that Dail on the 4th November 1982. The Minister for Justice, Mr Noonan when speaking on the Second Stage of the Bill recommended it to the House in the following terms:

I introduced this Bill for two reasons. It gives an alternative sanction to the Courts. Instead of sending somebody to prison for a crime, if he is over sixteen years of age he can be sentenced to community service work. That gives the Courts the flexibility to decide what in many cases might be a more appropriate sentence. In many cases somebody in employment who is sentenced to prison can be punished twice for the same crime. As well as being sentenced to prison he can lose his employment. Community services can be carried out during holiday time and at week-ends. … There is another benefit here. It is not simply a case of taking the soft option. Frequently Judges faced with the dilemma of a young person doing the leaving certificate will refrain from putting him into prison because very often there is not an alternative sanction available.

These are some of the positive advantages of what we are proposing but there are other advantages to which many Deputies referred. We have a serious problem in our prisons at present. If somebody is sentenced for a serious crime to five, six or seven years imprisonment, prison space must be found by letting out somebody who is serving a shorter period of imprisonment. This is not paroling prisoners or letting out prisoners under intensive supervision, this is simply shedding people from the system to make space for more serious offenders. In 1982 1,200 prisoners were shed from our prisons without completing their sentences. If we had more prison space we would not have to shed, but that would involve a colossal building programme and new prisons cannot be put up overnight...Apart from the positive advantages of the Community Service Bill, I am saying that by keeping people out of prison and providing the Courts with alternative sanctions, it can reduce this problem of shedding in the prisons. I stress that I am not talking about letting people out for good behaviour under the normal rules of parole or of the very effective scheme of intensive supervision run by the probation and welfare section of my Department, I am talking about people being let out to make room for a more serious offender who is to be accommodated within the prison system on the day he is sentenced. That is the crunch problem in our prisons, and that is why I have chosen this measure as the first instalment in a series of alternatives which I hope will go a long way to combating our present crime-wave. (Dail Eireann, vol. 342, col. 320-321 4th May 1983, Mr Noonan).

An amendment by Dr Michael Woods, T.D., the opposition spokesman on Justice, to allow for community service to be made also in respect of offenders where a non-custodial sentence might otherwise be imposed was rejected by the Minister on the grounds that community service might then be used as an alternative to fines or probation orders. However, the Minister for Justice was not for turning on a central plank of the policy in the Criminal Justice (Community Service) Bill 1983, namely to allow for community service orders to be made by Courts only in circumstances when a custodial penalty was in immediate contemplation. He quoted Young (1979) who identified the risk of an increase in the prison population where such offenders sentenced to community service for crimes which might otherwise have been disposed of by a fine, would increasingly be incarcerated for breach of community service orders.

A reading of the Oireachtas Debates leaves little doubt that any new penal measure which might in the least way possible increase the burden on the prison system was to be steadfastly avoided and therefore excluded by all statutory means in the Bill. This was so even though Deputy Shatter, a member of the Government Party sponsoring the Bill, made a similar proposal to that of Dr. Woods; the Minister remained resolute in resisting such broadening of the application of community service to penalties other than immediate custodial penalties.

The Target Group Anticipated in the White Paper and Oireachtas Debates

The White Paper (1981) referred to the use of community service for "suitable offenders" (par. 3) convicted of offences punishable with penal servitude, with imprisonment and with detention. Non-capital murder which carried at that time penal servitude for life and offences triable before the Special Criminal Court and a court martial would be excluded from the scheme but it gave no further detail of the precise categories of offences or offenders who might be suitably dealt with by way of community service order.

The legislation at Section 2 and Section 4 was equally silent as to the intended target group of offenders or offences which might be suitable for community service orders, except to exclude for consideration offenders in respect of whom the penalty for their offences is fixed by law (Section 2). Section 1(1) provides that "Court" does not include a Special

Criminal Court and accordingly that Court is also precluded from considering community service as a sanction. The provision of community service for such a wide group of convicted persons potentially encompassed 80% to 90% of the entire prison population including potentially deep-end (Cohen 1985) or long term convicted persons, convicted persons with potential sentences ranging from one to five years and shallow-end (Cohen 1985) or minor offenders convicted and potentially sentenced to imprisonment for a period from one week to one year.

When the Bill was discussed in the Oireachtas very few speakers addressed the type of offences in respect of which community service should be imposed instead of imprisonment, although many speakers spoke in general terms on the desirability of using community service widely, especially in cases where the District Court was exercising jurisdiction. The District Court jurisdiction is fixed by the Criminal Justice Act 1951 where the maximum penalty which can be imposed for an indictable offence tried summarily in that court is twelve months imprisonment. Without being prescriptive, Senator O'Leary sought to indicate the category of offenders who might be suitable for community service thus:

> If a person robs a bank or commits murder the overwhelming majority of people will agree that restricting the liberty of that individual is a good thing and we should have a prejudice in favour of doing that. Of course, there will always be exceptional cases where it is not appropriate. That type of crime which fits into the period when young people are trying to assert themselves within the community, trying to establish what their role is and showing by their actions their independence from the previous generation, results from a desire to show independence rather than any real desire to break the law. A lot of the joy-riding that takes place is not criminal in the ordinary sense of the word, but an expression of the desire of these young people to participate in what they see to be the good things in life, by being mobile, with all the added social advantages that being mobile confers on those who own cars. These sort of offences could be properly dealt with in this way (Senate Debates, vol.101, col.849, 7th July 1983).

And he further suggested:

> Very often in the type of offences dealt with under this Bill a short custodial sentence of seven days to one month will be in the mind of the Court (Senate Debates, vol. 101, col. 852, 7th July, 1983).

It is quite clear from this contribution by an influential lawyer in the Senate, the target of community service was the soft end of offender categories for offences invariably dealt with by the District Court and exercised within that limited jurisdiction.

The Legislation

The legislation which gave effect to community service in Ireland, namely the Criminal Justice (Community Service) Act 1983, was almost an exact replica of the Criminal Justice Act 1972 which gave effect to community service in England and Wales. Notwithstanding the similarity between the two pieces of legislation, the Department of Justice, the sponsoring Department for the legislation, had the benefit of critical analyses done by the Home Office Research Unit and Young (1979) and the critical question relating to the tariff position of the penalty of Community Service was addressed and to some extent resolved in the Irish legislation under Section 2 which provided:

> This Act applies to a person (in this Act referred to as an offender) who is of or over the age of sixteen years and is convicted of an offence for which, in the opinion of the Court, the appropriate sentence would but for this Act be one of penal servitude, of imprisonment or of detention in St. Patrick's Institution, but does not apply where any such sentence is fixed by law.

Section 3 provided:

> Section 3 (1) Subject to Section 4, the Court by or before which an offender is convicted may, instead of dealing with him in any other way, make, in respect of the offence of which he is convicted, an order (in this Act referred to as "Community service order") under this Section.

Subsection 2. A community service order shall require the offender to perform in accordance with this Act, unpaid work for such number of hours as are specified in the order and are not less than forty and not more than two hundred and forty.

Subsection 3, nothing in this Section shall be construed as preventing a court which makes a community service order from making, in relation to the offence in respect of which the order is made, an order under any other enactment for –

a) The revocation of any licence;

b) The imposition of any disqualification or endorsement;

c) The forfeiture, for confiscation, seizure, restitution or disposal of any property; or

d) The payment of compensation, costs or expenses.

Section 4 provided:

i. A Court shall not make a community service order unless the following conditions have been complied with:

a) The Court is satisfied, after considering the offender's circumstances and a report about him by a Probation and Welfare Officer (including if the Court thinks it necessary, hearing evidence from such an officer), that the offender is a suitable person to perform work under such an order and that arrangements can be made for him to perform such work, and

b) The offender has consented.

ii. Before making a community service order in respect of an offender, the Court shall explain to him –

a) The affect of the order and, in particular, the requirements of Sections 7(1) and Section 7(2), and

b) The consequences which may follow under Sections 7(4) and (8) if he fails to comply with any of those requirements, and

c) That under this Act the District Court may review the order on the application of either the offender or a relevant officer.

The specific provision under Section 2 allows for no doubt as to the function of community service as an alternative to custody only. It is not permissible for a Court to impose community service except in lieu of a custodial sentence which would have been imposed except for the possibility of imposing a community service order otherwise. By contrast the provision in the English legislation allowed for a wider application of community service orders provided only the offence was an "imprisonable offence". A second point of contrast between the Irish and English legislation concerns the minimum age of an offender who might be given a community service order. Section 2 specifies the minimum age of sixteen years and refers to places of detention, i.e. St Patrick's Institution. The minimum age for committal to such institution is sixteen years. Section 3 mimics the English legislation in every respect.[33] Specifically the section allows a court to make what might be termed ancillary orders in addition to the penalty of community service such as disqualifications for drunk-driving or endorsement of a driving licence in addition to a community service order.

The procedure for breach of any requirements of a community service order is set out in Section 7 and 8 of the Criminal Justice (Community Service) Act 1983[34]. The standard

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[33] As previously noted the English Criminal Justice Act 1972 provided for an extension of the scope of their legislation to 16 year olds but limited the number of hours to 120 for that age group.

34 Section 7-

1. An offender in respect of whom a community service order is in force shall –
   a) Report to a relevant officer as directed from time to time by or on behalf of the officer referred to in Section 6(2) or 10(2), or by or on behalf of an officer discharging functions previously discharged by that officer,
   b) Perform satisfactorily for the number of hours specified in the order such work at such times as he may be directed by or on behalf of the relevant officer to whom he is required to report under this Subsection or by or on behalf of an officer discharging functions previously discharged by that officer and
   c) Notify the officer to who he is required to report under this section of any change of address.

2. Subject to Section 9, the work to be performed under a community service order shall be performed in the period of one year beginning on the date of the order but, unless revoked, the order shall remain n force until the offender has worked under it for the number of hours specified in it.
3. Directions given under subsections 1(b) shall, so far as practicable, avoid any interference with the times the offender normally works or attends a school or other educational or training establishment.

requirements imposed on an offender required to perform community service are (Section 7(1)) firstly to report to the relevant officer for community service, secondly to perform satisfactorily the work required and thirdly to notify the officer of any change of address. Section 7(4) provides for the creation of a discrete offence if the requirements are not complied with while the community service order continues to have full force and effect. However, Section 8 allows the court, hearing the charge under Section 7(4), the alternative option of simply revoking the community service order or revoking the community service order and dealing with the offender in any manner as if the order had not been made.[35] In an application under Section 11 for revocation of a community service order, the court has a similar discretion to simply revoke the community service order seemingly without any further sanction, or revoke and deal with the offender in any manner as if the community service order had not been made. The words "revoke or revoke and deal" should not be construed to mean that a revocation *simpliciter* automatically gives rise to the imposition of the custodial sentence required before the community service order was originally imposed (Section 2 and 3). In the absence of express words in the section itself to connect the automatic imposition of the custodial sentence, it is not possible to construe the word "revoke" to mean anything other than the formal revocation of the community service order itself. Put simply, the word "revoke" refers to the order under section 3 only but the prior requirement of an immediately contemplated custodial sentence under section 2 is not properly linked within section 8(1)(a) to give rise to the automatic imposition of the custodial sentence upon revocation.

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4. An offender who fails, without reasonable excuse, to comply with the requirement of Subsection 1 shall be guilty of an offence and, without prejudice to the continuance in force of the community service order, shall be liable on summary conviction to a fine not exceeding £300.
5. An offence under Subsection 4 may be prosecuted by a relevant officer.

Section 8 - 1. Where an offender is convicted of an offence under Section 7(4), the court, in lieu of imposing a fine under that Section, may –

a) If the community service order was made by the District Court in the district of residence, either revoke the order or revoke it and deal with the offender for the offence in respect of which the court was made in any manner in which he could have been dealt with for that offence if the order had not been made.

35 Section 11 – 1 Where a community service order is in force and on application by the offender or a relevant officer, it appears to the District Court that it would be in the interests of justice, having regard to circumstances which have arisen since the order was made, that the order should be revoked or that the offender should be dealt with in some other manner for the offence in respect of which the order was made, the court may –

a. if the order was made by the District Court in the district of residence, either revoke the order or revoke it and deal with the offender for that offence in any manner in which he could have been dealt with for that offence if the order had not been made.

These provisions empower the courts hearing breach proceedings and revocation proceedings with a very wide discretion when disposing of such cases. The sentencing requirement under Section 2 of the Criminal Justice (Community Service) Act 1983 limits the court to imposing a community service order to cases only where the court is minded to impose an actual custodial sentence. However, when the issue of breach of the community service order is examined this constraining effect is to all intents and purposes abandoned. When breach of community service or revocation of community service are separately considered under Sections 7, 8 and 11 of the Criminal Justice (Community Service) Act 1983, the court is unfettered in its discretion to deal with the offender in any manner the court might determine.

Notwithstanding these provisions, it is argued that the purpose of the community service order under Section 3 is still integrally connected to the defining features of Section 2, to restrict the making of the community service order to custodial cases only. However, the unfettered discretion given to courts to deal with offenders who breach community service orders appears to undermine the rationale contained explicitly in Section 2. Undoubtedly the courts must be given some discretion when dealing with breach and revocation proceedings, especially in respect of offenders who have substantially completed or complied with a community service order. However, the discretion invested in the courts under Sections 7, 8 and 11 of the Criminal Justice (Community Service) Act 1983 appears to be totally disconnected with the original requirement that a real custodial sentence was warranted before the community service order was firstly imposed. The genesis of this wide discretion can be clearly traced to the seminal English statute which introduced community service in that jurisdiction. Section 17(3) of the Criminal Justice Act 1972 (England) provided for exactly the same discretion in almost the exact same formula of words. In the section, a fine not exceeding £50 may be imposed for breach of community service requirements or the court may revoke and deal with the offender in any manner had the order not been made.[36]

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36 Criminal Justice Act 1972 – Section 17(3)

If it is proved to the satisfaction of the court before which an offender appears or is brought under this section that he has failed without reasonable excuse to comply with any of the requirements aforesaid, the court may, without prejudice to the continuance of the order, impose on him a fine not exceeding £50 or may –

a) if the community service order was made by a Magistrate's Court, revoke the order and deal with the offender for the offence in respect of which the order was made, in any manner in which he could have been dealt with for that offence by the court which made the order if the order had not been made;

But the essential point of difference between the Irish and English legislation is that the English legislation allowed for the making of a community service order in respect of an "imprisonable offence" whereas the Irish legislation required the immediate contemplation of custody before a community service order can be made. Thus the English revocation proceedings are consistent with an original wide discretion when making a community service order whereas the Irish legislation certainly is not. The importation of the phrase "in any manner" from the English legislation gives the Irish court an expansive discretion when dealing with breach and revocation of community service but it does not shift the original basis upon which an Irish court must structure the making of the community service order i.e. in lieu of custody. The prescient words of Deputy Kelly must be recalled when he cautioned against copying legislation from other jurisdictions when one considers the apparent contradictions contained in Section 2 and Section 7, 8 and 11 of the Criminal Justice (Community Service) Act 1983. By any reasonable interpretation, a wide ranging discretion unwittingly imported from Section 17(3) of the English legislation into the Irish Act appears to undermine the purpose of the community service order as a penalty designed to act as an alternative to custody.

Section 4 is a very interesting section. Section 4(1) (a) is a subtle variation on the English section which provides:

> Section 15
>
> (2) A Court shall not make a community service order in respect of any offender unless the offender consents and the Court –
>
> (b) is satisfied
>
> i. after considering a report by a probation officer about the offender and his circumstances and, if the Court thinks it necessary, hearing a probation officer, that the offender is a suitable person to perform work under such an order; and
>
> ii. that provision can be made under the arrangements for him to do so.

But the position of the word "report" in the Irish section changes entirely the requirement to provide a report of an extensive nature on the offender's "circumstances" and limits the

task of reporting on the defendant's suitability and that suitable work is available for him/her to perform community service. In the Irish section the court must consider the offender's circumstances which it does at the sentencing part of the trial by way of submissions from the defence counsel or solicitor or by direct enquiry of its own motion at the trial. A social enquiry report is not required under Section 4(1) (a) of the Irish legislation but the tradition of providing extensive reports has remained a practice in certain parts of the country for 57% of community service reports (Walsh and Sexton 1999:73). The Comptroller and Auditor General (2004) has estimated the cost of producing an individual pre-sentencing report as between €800 - €900, although he does not differentiate between the costs of extensive social enquiry reports and very brief suitability reports for community services. Walsh and Sexton (1999:74) suggest that the practice of providing extensive reports in 57% of all referrals for reports under Section 4(1)(a) may be attributable to a number of factors including matters of local legal culture and probation culture[37].

When interviewed on the issue the judges in general favoured something more extensive than a bare "yes" or "no" as to suitability but notwithstanding did not require a report of great detail.

One judge put it thus:

> "…I get a bit of both. I don't get a huge social enquiry. I do get a report on how the person interacted with the probation service; whether they showed a genuine interest in carrying out the community service; whether there was work available for them and whether the recommendation is there as to suitability or not. That is important to me. I would not like a two liner I would have to say … effectively the focus is really on the person, his suitability and his willingness to participate in the scheme." A6J1DC

While another stated that reports generally should be:-

> "short to medium.".A1J5DC

37 Of the two hundred and fifty-seven community service reports available in the files: 57% can be described as detailed reports, 33% are concise, while the remaining 10% can be described as very brief (Walsh and Sexton 1999:74). A detailed report typically covers two or three pages and contains substantial information about the offender's personality, background, education, skills, employment, family circumstances, as well as details about the offence and the circumstances in which it was committed. These reports often contained details of a mitigating explanation from the offender about why he/she committed the offence. By contrast the very brief reports are less than half a page in length and contain very sparse information about the offender and, usually, no information at all about the circumstances in which the offence was committed. Many of these are no more than four or five lines. In between are the reports which might be described as concise. Typically these would be about one page long and would contain information about the offender's current family and employment circumstances, as well as some information about the offence. They lack the detail and comprehensiveness of the full and detailed reports but are more informative than the very brief reports. Limerick accounts for all of the reports which can be described as very brief where 84% of its reports fall into this category. 79% of the reports from Cork probation area come within the concise category as does 85% for Tralee. One hundred percent of the reports from Wexford, Sligo, Navan, Dundalk, and Athlone probation areas fall into the detailed category. In the Dublin probation area seventy percent of the reports can be classified as detailed while 30% can be classified as concise (Walsh and Sexton 1999:74).

A report as to suitability for community service should be comprehensive, it is argued, if the finding of the report is that the offender is unsuitable. The offender is entitled to know in detail why she/he is deemed unsuitable and is now to face a custodial sentence (DPP-v-Timothy Nelligan, Cork District Court, 19th April 2008, Irish Examiner, case under appeal on this point)

As previously mentioned in Chapter 2, the probation officer's training as a social worker found resistance to the new penalty of community service where punishment was the primary aim of the sanction. The punitive role of community service is accentuated in the Irish community service order for adults in light of the requirement that the community service order could only be made in lieu of an immediate custodial penalty. One can only speculate that the juxtaposition of the word "report" in the Irish legislation, to exclude the necessity of a social enquiry report was intended to limit the function of the Irish probation officer in the preparation of suitability reports to the narrow role of penal agent of the court, a function which challenged the traditional social worker paradigm of the service (Halton 1992, 2007).

Notwithstanding the administrative guidance offered to the Irish probation officer in the booklet *The Management of the Community Service Order* (1998) it is not necessary to provide in the report to the Court itself all the information gleaned in the assessment, by way of a social enquiry report; all that is required is a positive or negative indication as to the suitability of the offender to perform community service and that such work is available.

The issue of Consent

Section 4(1)(b) requires the prior consent of the offender to be given before the court can make a community service order. Although the issue of consent was discussed in Chapter 1, the practical expression of consent by offenders was observed by Walsh and Sexton in the court survey (1999) as follows:

> For the most part the accused were silent throughout, apart from two cases in Dublin where they spoke up to decline the option of a CSO. In none of the cases did the accused give an audible consent when asked by the Judge. In one case a CSO was imposed on the accused in his absence. (Walsh and Sexton 1999:70).

While the legislation and regulations are silent as to how the offender is to articulate his consent, there are potentially three avenues through which the offender can communicate his consent. Firstly, it is customary for the probation officer to indicate the consent or willingness of the offender to perform the community service in the report although the report may not usually be read out in open Court. Secondly, a Judge usually asks the offender directly in open court to give an indication of his consent to perform the community service and this invariably is given, otherwise, if consent is not indicated when requested, the court simply cannot make the order. Finally, the defence solicitor will usually also communicate his client's consent when the court initially contemplates making a community service order and before a report is commissioned from the probation and welfare officer. Courts generally are reluctant to commission a report from the Probation Service if consent is not forthcoming at this initial stage. Usually defendants are represented under the criminal legal aid scheme by solicitors assigned to the panel for the relevant Court. It is argued that legal aid is necessary for the defence of any accused person given a community service order under the Supreme Court ruling in the State (Healy) – v – O`Donoghue [1976] I.R. (3-5) which has effectively determined that the right to criminal legal aid is, in circumstances which are quite wide in practice, a constitutional right. The Supreme Court indicated that legal aid services should be provided to persons facing serious charges which could result in the loss of their liberty. As community service orders can only be made in lieu of imprisonment, there and then contemplated by a sentencing court, it is argued that no person should be given a community service order without having legal representation both for the substantive trial and the sentencing trial. In practice, the ruling in the State (Healy) – v – Donoghue of granting legal aid to indigent offenders applies to in excess of ninety-five percent of all cases tried in the Irish criminal courts (Criminal Legal Aid Review Committee 1999).

A much more fundamental matter arises when one asks "what is the defendant consenting to do?" Although the Act provides that community service should only be contemplated and used in cases where an immediate custodial penalty is in prospect, the legislation does not oblige the court to specify the alternative custodial penalty in specific terms, for example, one hundred and twenty hours community service in lieu of six months imprisonment. When the Criminal Justice (Community Service) Bill was discussed in great

detail in the Senate, Senator O'Leary[38] proposed that the Court should inform the offender of the actual sentence, which would be imposed, if he did not consent to the making of the community service order. Senator O'Leary argued in an amendment made to the Bill that this should be obligatory upon the Court when making a community service order. This proposal was supported by Senators Durkin, Fallon, Ryan, Honan and McGuinness. In dismissing Senator O'Leary's amendment, the Minister for Justice promised to deal with these issues in regulations but such regulations were not to appear subsequently. An oblique reference is made to the specified alternative penalty in the District Court Rules which provide for the procedures of that court to give effect to particular statutory measures. However, as the statute was silent as to any requirement to specify the alternative custodial penalty, the regulations drawn up by the District Court Rules Committee and approved by the Minister for Justice did not address the issue either, except in the form provided, under the District Court [Criminal (Community Service) Act, 1983] rules 1984 Rule 4, a community service order made by the Court under Section 3 of the Act shall be in the form 1 and Form 1 provides inter-alia

> … the appropriate sentence would be one of (blank) imprisonment / detention in St. Patrick's Institution for months.

This is the only reference in any statutory or regulatory arrangement where the Court is required to specify precisely the alternative custodial sentence. The Circuit Court Rules do not make mention of community service and so it would appear that there is no regulatory requirement on a Circuit Criminal Court Judge to specify the precise alternative custodial sentence which is to be substituted for any community service order. A similar situation appears to apply in respect of the Central Criminal Court. The absence of formal rules of Court to govern the making of such orders, or the extension of time for the performance or revocation of such orders, may give some indication of the marginalised nature of community service orders as sentences in these courts which deal solely with non-minor indictable offences.[39] Notwithstanding the absence of any statutory or regulatory requirement which would oblige a court to specify in advance the alternative period of custody to be served, it is clear from the decision in *Foley* that every community

38 later Mr Justice O'Leary of the High Court

39 In Foley – v – Judge Murphy and DPP [2005 3 I.R. 574] Dunne J declared that an order for Community Service must show on its face what the appropriate term of imprisonment would be but for the making of a Community Service Order. Otherwise the court does not show jurisdiction to make such an order.

service order must specify the alternative period of custody on its face in order to show jurisdiction. This would appear to be so irrespective of which level of criminal jurisdiction is being exercised.[40]

If a court was to impose a community service order on an offender without specifying in advance the exact period of custody in lieu to be served, it is arguable that an offender may be precluded from making an optimal rational choice if she/he is not given the full details of the "contract" to be entered into between her/himself and the Court, i.e. the performance of X number hours Community Service in lieu of Y months imprisonment. This issue was examined in Chapter 1 with reference to the imposition of community service where the offence in England and Wales is an "imprisonable offence" but where the alternative penalty may indeed upon breach be substituted by a fine.[41]

Senator O'Leary in the Third Stage Debate on the Criminal Justice (Community Service) Bill had the following astute observation to make. He observed that quite often a prison sentence is threatened in Court by a District Justice when he has no real intention of carrying it out. He stressed that the dividing line between a fine and a prison sentence in reality is very thin. (Senate Debates, vol . 101, cols. 874-875, 7th July, 1983).

It is not possible, from studies conducted to date, to ascertain with any degree of certainty whether sentencers punish offenders with community service without intending to apply custodial sentences in their stead. Walsh and Sexton (1999) do claim however to have provided such evidence based on interviews with probation officers and surveys of community service orders matched against certain offences. In particular, one District Court area surveyed showed a liberal use of community service orders for first time drink-driving offences. It is argued here that this limited information cannot be put forward as evidence of inappropriate use of community service, unless it is shown that the same

40 In People (D.P.P.) –v- James O'Reilly, (Court of Criminal Appeal unreported 11 December 2007) the court imposed a community service order upon the offender who was convicted of dangerous driving causing death. The order on file in the Court of Criminal Appeal recites: "Quash sentence and impose in lieu 240 hours community service order, to be listed in 6 months time to ensure compliance, affirm 6 years disqualification order" (examined by writer). The use of the phrase "in lieu" does not necessarily mean that the community service order was imposed in direct substitution for a custodial sentence as the court in its judgement was clearly never minded to impose a custodial sentence in the first place. The court had been petitioned by the D.P.P. to overturn a suspended sentence originally imposed on the grounds that it was too lenient and had no general deterrent effect. It is difficult to reconcile the form of community service used in this case with the requirements of Section 2 of the 1983 Act which requires the prior contemplation of an actual custodial sentence. Arguably, this would exclude the consideration of a suspended sentence which clearly the court was also not minded to impose. A similar approach was taken by the same court in People (D.P.P.) –v- Andrew Keogh, Court of Criminal Appeal (extempore), 9th June 2008.

41 In Foley –v- Judge Murphy and DPP [2005] 3 I.R. 574, Dunne J. accepted that a specified term of imprisonment does not operate as a default punishment if the accused fails to complete the community service order (O'Malley 2006:480-481). The court is empowered under section 7 of the Criminal Justice (Community Service) Act 1983 to impose a fine without prejudice to the continuation in force of the community service order. Alternatively, the court may revoke the order and deal with the offender in any manner (section 8) as if the community service order had not been made initially. This latter provision does not necessarily presuppose the imposition of a custodial sentence upon breach.

sentencing Judge did not impose custodial sentences for first time drunk-driving cases, or where upon breach of community service for the same offences the same Judge did not impose an ultimate custodial penalty as specified in his order. It might be observed that any attempt to access the true intentions of the sentencing Judge as to the intention to incarcerate or not before considering community service in the examples put forward by Walsh and Sexton (1999) might prove to be an impossibility. Senator O'Leary's observation that District Justices threaten to do one thing but do quite another and the observations by Probation Officers that certain cases would not have warranted a custodial sentence may be an indication that community service in Ireland is used in a manner inappropriately and wider than that intended by the legislation. However, any attempt to give a definitive answer on this question must remain speculative. It does however bear upon the true issue of consent that an offender is consenting to community service in lieu of a real sentence of imprisonment in the alternative.

Had the Minister for Justice in the Senate Debate Third Stage accepted the amendment of Senator O'Leary, requiring that any sentencing court specify, on the making of a community service order, the alternative period in custody, the legislation would have been improved further. As 96% of community service orders are made in the District Court (Walsh and Sexton 1999) the offender will invariably know the specified alternative custodial penalty although Walsh and Sexton claim that "the reality, of course, is that not every individual served with a CSO would have served time in prison if CSOs were not available". (Walsh and Sexton 1999:77). This latter claim might put in doubt the consensual nature of the "contract" to perform community service by an offender when voluntary work in the community is exchanged for a custodial sentence which may never have been in contemplation by the sentencing judge.

In the interviews with the judges for this study one judge when asked what was the most important feature of community service replied:

> "I would think that the most important aspect of it is that the defendant knows that he has been sentenced and this is an alternative to that and that he has come very close to actual incarceration." A2J1DC

This reply identifies not only the relationship between community service and custody but also highlights the realisation by the offender that if community service was not considered at all then custody would have been the alternative sanction.

In the Senate debate Senator Durcan approached the consent issue from a slightly different angle. He pointed out that unless a statement of the original detention period was specified in the order at the time of hearing it would not be possible for another Judge to adequately deal with the issues of non-compliance without rehearing the case entirely (Senate Debates, vol. 101, cols. 885, 7th July, 1983) and Senator Ryan cautioned that in the absence of a specified penalty of custody, an offender would be on hazard of a more severe penalty, particularly if the breach case was dealt with by another Judge unfamiliar with the case and the offender's circumstances (Senate Debate, vol. 101, col. 886 7th July, 1983). In their empirical study Walsh and Sexton (1999) identified a significant number of cases where the continuance of community service procedures in respect of the same defendant in the District Court were taken up by different Judges.

However, in Burns – v – Governor of St Patrick's Institution (unreported, High Court transcript extempore 1995 -161 SS, 3rd February 1995 Kinlen J.), when dealing with an enquiry under Article 40 of the Constitution (habeas corpus) the High Court released an offender remanded in custody back to the original Judge (Judge Hussey) who had decided to impose a community service order on the applicant/offender. The applicant in the High Court case had been remanded in custody by Judge Windle of the District Court, when the offender failed, when asked by the Judge, to explain what community service was and when he might commence the order. Although the case clearly turns on its own particular facts, the High Court discouraged the practice of another Judge dealing further with an offender when the original Judge was not sitting to hear the matter, for whatever reason. In the above case, Kinlen J. released the offender on bail and remanded him back for hearing before Judge Hussey of the District Court who had originally dealt with the case and had signified a community service order would be made if the defendant was found suitable.

The issues of the offender's consent to perform community service may also be examined from a slightly different angle when the type of work to be performed is an issue. Thus far, the issue of consent has been examined in the context of a "trade off" or exchange for a

real or apparent custodial sentence. But an offender may equally decline to perform community service when the alternative custodial sentence is known to him in advance on the grounds that the service to be performed is in some fashion disagreeable to him/her. This aspect of consent was illustrated by one judge in the study when he said:

> "I had one fellow who asked me. He said the community service was against his religion. So, I enquired what this was all about. It was cleaning toilets. With apologies to the ladies present, his comment was that's women's work so I said that's fine 3 months concurrent. I know that'll change his mind and he's going to do it." A1J4DC

Section4(2)(a), (b) and (c) of the 1983 Act are important as a reinforcement of the consent aspect of the order where, assuming it is a District Court order, the alternative custodial penalty is specified and known to the offender in advance. Moreover, the specific requirements of compliance by the offender are required to be explained clearly by the court. The adoption of this procedure ensures there is little room for ambiguity in what is required of the offender to satisfactorily comply with the order. This may assist to some extent, the function of the probation officer in his or her negotiated relationship with the offender when dealing with absenteeism and other infractions by the client/offender in completing the order.

Section 4(2) is remarkable for another reason entirely. The like worded Section in the Criminal Justice Act 1972 (England and Wales), Section 15(9)(a), (b) and (c) represents a successful amendment made by Baroness Wootton in the House of Lords in the original Criminal Justice Bill which proposed community service in that jurisdiction. In Section 4(2) (a), (b) and (c), whatever the protestations of the Minister for Justice when introducing the Bill in the Dail on the origins of community service and the need to look to international experience besides that of our neighbours in Britain and the Whitaker Committee Report (1985), the direct hand of Baroness Wootton is manifest in the Irish legislation. Undoubtedly the procedure outlined in Section 4 subsection (2) helps to clarify for the offender the issue of consent and his relationship with the Court and the probation officer as agent of the Court.

The Probation Service Administer Community Service

The task of administering the community service scheme was given by statute to the Probation Service. In her study in 1990, Helena Jennings outlined the approach taken by

the Probation Service to operationalise the community service scheme in Ireland. In particular she outlined a series of meetings between the District Court Judges and the Probation Service under the procedure for statutory meetings pursuant to Section 36 of the Courts (Supplemental Provisions) Act 1961.[42]

Once the Scheme was operational, further meetings were held between the District Justices and the Probation Service including visits by District Justices to community service projects.

The caution which attended the introduction of the idea of community service in the White Paper and in the Dail Debates, combined with the specific targeting by the Probation Service of the District Court as the jurisdictional base for making community service orders, the absence of rules of Court in the Circuit Court to provide for the making, extension and revocation of community service orders, collectively suggest that community service was obliquely understood to act solely as a District Court sentencing disposition. This understanding quickly hardened into a practice which has remained almost constant since community service was introduced into Irish sentencing law in 1984. However, the wider consideration to use community service orders as a decarcerative device generally, without specific reference to serious and non-serious offences, may have been curtailed by this unspoken understanding between the Executive (Minister for Justice and the Probation Service), the Legislature and the Judiciary.

The role of rehabilitation in community service was emphasised by a number of probation officers interviewed by Walsh and Sexton (1999) in their survey which strongly suggested the community service order report might serve a wider function other than indicating the offender's suitability to perform the work and that arrangements could be made for the performance of such work. Some probation officers interviewed expressed themselves variously: "I assess their suitability and concurrently investigate an appropriate placement";

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42 Sec. 36(a) The President of the District Court may convene meetings of the Justices of the District Court for the purpose of discussing matters relating to the discharge of the business of that Court, including in particular such matters as the avoidance of undue divergences in the exercise by the Justices of the jurisdiction of that Court and the general level of fines and other penalties.

(b) Such meetings shall not be convened more frequently than twice in one year.

(c)Every Justice shall attend at every such meeting unless unable to do so owing to illness or any other unavoidable cause and, where a Justice is unable to attend such a meeting, he shall as soon as may be inform the President of the reason therefor. (The Courts (Supplemental Provisions) Act 1961, Section 36).

"I simply assess the guy and see if he is suitable or not"; "(I make) an honest assessment of people's ability to do community service. I need to be able to stand over it in Court". Others saw their role more in terms of a mission to assist in the rehabilitation of the offender: "I am a social worker so I try to make a connection vis-à-vis a fairly dynamic report to the Court"; "I see it as somewhat broader than just community service. I try to look at the addiction issues"; "I give a picture to the Court of who the client is. I often point out the terrible disadvantages these people have faced in life"; "I let the client know of this great opportunity to stay out of prison" (Walsh and Sexton 1999:75).

The Probation Service was identified in the White Paper as the agency which would manage and execute the community service scheme. The imposition of such a function upon the Probation Service could be viewed, as noted previously, as an attempt to graft onto the everyday practices and cognitions of probation officers a task which was essentially punitive in nature (Halton 2007:192). Previously the orientation of the Probation Service was informed by a more humanistic and interventionist approach towards their clients. In her study of change in probation practice in Ireland Halton quotes one of her interviewees on this topic as follows:

> "You do not engage with the person in community service, they're doing their work and you must certify to the court that they have done it or breach them if they have not. I think this model has given the stakeholders-The Department of Justice, and maybe the political system, the idea that probation might be a quick and cheap fix. That's it. I suppose there's no political support in the country for engaging with the person who's doing damage in the community." (Spwoy) (Halton 2007:194)

This viewpoint, which was widely expressed in Halton's study, presupposes that the administration of the community service scheme by the Probation Service would be imbued with the traditional probation ethos of caring, intervention and discretion. Instead community service was to present a serious challenge to the Irish probation officers worldview which curtailed the discretion exercised by them in the supervision of offenders and limited the probation practices and modalities which were the norm for persons placed on traditional probation (section 1(1)(b) Probation of Offenders Act 1907).

Accordingly when the Probation Service were specifically invested with the function of bringing the community service order into operation the agency embarked upon a process of change which would seriously realign that agency as a functionary of the court and within the justice model.

PART 2

THE OPERATION OF COMMUNITY SERVICE ORDERS IN IRELAND

Community service as a sentencing option has been available to the Irish courts since 1984, but how have the courts made use of the sanction and with what frequency? Was the sanction to achieve widespread application in every criminal court or did it predominate in the sentencing patterns of any particular court? Was the target group identified in the White Paper or the Oireachtas debates reached in sentencing practice and to what degree? These issues will be dealt with presently in light of a series of studies conducted since the introduction of the sanction. To answer these questions the analytical approach adopted hereafter is to examine common issues associated with the sanction of community service but under different headings. Such an approach will facilitate a fuller understanding of the sanction in everyday practice. In the course of such examination, some issues may appear to be revisited more than once but from slightly different angles, e.g. the critical relationship between community service and the custodial sentence. The judges' responses on the community service order deal not only with the relationship between community service and imprisonment, but range far wider touching upon such issues as the suitability or more critically the unsuitability of offenders for community service; concerns about the use of discretionary practices and finally factors which otherwise may inhibit the greater use of the sanction. This section will disclose that community service in Ireland is not utilised as an alternative to the custodial sentence as often as one might expect in the circumstances. The present use of community service is limited to relatively few courts. On the other hand the sanction of imprisonment endures as the benchmark upon which many sentences are measured due it will be argued, to a reluctance by sentencers to deploy other sanctions including community service. Such reluctance may be due in part to a lack of confidence that fines will be collected, offenders on community based sanctions will be

properly supervised and risk concerns that certain offenders should not be given their liberty.

The Sanction Reviewed

The community service order in Ireland has been the subject of a number of studies academically and by way of policy review since its inception. The operation of community service in Ireland was examined by Helena Jennings in 1990 – *"Community Service Orders in Ireland: Evolution and Focus"*, who traced the origins of community service orders in Irish sentencing law and the implementation of the penal measure.

In 1998 the Expert Group on the Probation Service under the Chairmanship of Mr Brian McCarthy published its first report which was quite specific to one issue relating to occupational insurance when it considered the sanction. The Expert Group recommended:

> The Criminal Justice (Community Service) Regulations, 1984 [Regulation 4(a)] which require groups participating in the community service order scheme to carry out their own insurance should be amended. Insurance cover for voluntary groups which have work carried out under the community service order scheme presents difficulties. The regulations which require that groups have to arrange their own public liability insurance is seen to be a problem which discourages them from participating in the community service projects (Expert Group 1998:26).

This recommendation was made seemingly on the basis that voluntary groups were reluctant to take out separate insurance cover for community service offenders. One might speculate that voluntary groups would otherwise provide placements for community service but were precluded from doing so due to the prohibitive costs of public and employer liability insurance premiums. This recommendation was adopted by the Government who provided indemnities to such schemes against claims arising during placements. (Comptroller and Auditor General – Value for Money Examination 2004).

In the years since the Bill was passed into law, there had been calls in the Oireachtas to broaden the use of community service to allow sentencers to use it in lieu of other non-

custodial penalties. As previously observed from the survey, sentencers generally endorse such an approach. Walsh and Sexton in their study in 1999 reported :

> … One Judge openly acknowledged that he was not favourably disposed to the use of CSOs because he felt that the requirements imposed on their use by the 1983 Act were too restrictive (Walsh and Sexton 1999:68).

Although Walsh and Sexton did not elucidate on the nature of the "restrictions" which the Judge referred to, it is reasonable to assume from the context of the paragraph that these restrictions refer to the coupling of community service with custodial cases only.[43] There is no indication in this reply (Walsh and Sexton 1999) to show that the respondent was favourable to the use of the community service order as an alternative to custody. The judge in question appears not to accept the proposition that a custodial sentence could ever be substituted by a community service order as provided by Sections 2&3 of the Criminal Justice (Community Service) Act 1983. In the present study some of the judges interviewed did evince a reluctance to substitute a custodial sentence with community service especially for indictable offences. The reluctance of some judges to utilise the sanction at all (Petrus VFM 2009:38-41) may be due to a number of factors but the sentiment of the respondent judge in the Walsh and Sexton study above suggests that a significant number of judges do not regard the sanction as a realistic alternative to the custodial sentence and would only be prepared to use it as a penalty if it was available in its own right and specifically not as an alternative to a real custodial sentence.

The final report of the Expert Group on the Probation Service (1999) made a number of recommendations on community service, including, combination orders of community service and probation orders in one order (Expert Group 1999:par. 2.9) and having expressed satisfaction with the workings of the community service order, subject to the comments made in the first report (that the Probation Service provide insurance for schemes and not the voluntary agencies) recommended:

> … that such orders should be available as both an alternative to imprisonment and as a sanction in its own right. However, the Group are of the view that the imposition of a community service order as a sanction in its own right should be

43 Perhaps the judge in question did not believe a custodial sentence should be substituted by community service at all?

considered at the higher end of the hierarchy of non-custodial sanctions and accordingly should be utilised with discretion (Expert Group 1999).

The recommendation that judges use "discretion" in these circumstances flies in the face of an extensive literature which suggests that discretion when given to sentencers, tends generally to be exercised in such a way as to reach down and bring offenders into the custodial system much more rapidly and unnecessarily than would otherwise be the case if community service was limited specifically to custodial sentences only (Pease 1990, Young 1989, McIvor 1990, Cohen 1985, Hylton 1981).

The recommendation by the Expert Group to establish the community service order as a sanction in its own right is simply made without any discussion in the text of the Report. The recommendation seriously challenges the policy established in the Criminal Justice (Community Service) Act 1983 and maintained steadfastly without amendment to date. Except in relation to persons under the age of eighteen as provided for in the Children Act 2001, the policy has not changed in respect of adult offenders. The position of the Department of Justice in this regard was re-iterated no later than the 29th January, 2005 and after the publication of the Expert Group recommendation. In reply to Deputy Stanton to a Parliamentary Question seeking information, inter-alia, on the Minister's further plans in relation to community service orders, the Minister for Justice replied that he had no further plans in relation to community service orders at this time (Reply Minister for Justice to Deputy David Stanton, Dail Eireann, 29th January, 2005)[44].

The empirical study of Walsh and Sexton (1999) suggests that, even with statutory restrictions confining the use of community service to custodial sentences, the use by some courts of the penalty of community service is inappropriate, where they speculate a custodial sentence would not have been made in respect of some cases examined,

44 The Criminal Justice (Community Service) (Amendment) Bill 1992, a Private Member's Bill in the name of Deputy Gregory and moved by Deputy Shatter, was put and agreed in the First Stage (Introduction) which provided community service orders could be made in respect of offenders of twelve years of age and upwards. This Bill did not proceed further. However, it is of particular interest as yet another attempt to change the character and function of community service orders in Ireland. In particular, the minimum age fixed for community service at present under Section 2 of the 1983 Act is sixteen years of age; the minimum age for committal to St. Patrick's Institution, for offenders between the ages of sixteen and twenty-one years. Indeed, an earlier attempt along similar lines was made by Deputy De Rossa in the Third Stage of the passage of the Bill through the Dail to make the minimum age fifteen years, but the Amendment did not proceed on the grounds that default would require imprisonment of a fifteen year old which was not legally permissible.

particularly in cases of drunk-driving where there was no previous conviction.[45] Two Judges in separate focus groups acknowledged that they might occasionally use a community service order where no custodial sentence is immediately contemplated, especially in cases where heavy fines are otherwise imposed or where the offender may be deemed to be in need of structure in his/her lifestyle.

However, if the sanction of community service is decoupled from the necessity to impose a custodial sentence, it is argued that community service would be used much more extensively by judges in the District Court in lieu of fines, probation orders and even conditional discharges. Such use would not be in keeping with the use of community service as an alternative to custody but rather would be used much more extensively by District Court Judges as an alternative to other non-custodial sanctions.

Arguably, the result of such an increase in the use of community service in this manner would be to increase the number of persons in prison on the basis that the compliance rate with community service in Ireland is 81% of all community service orders, which figure is very close to the international average of compliance with community service (Walsh and Sexton 1999, Comptroller and Auditor General Value for Money 2004).

It is argued that if community service is decoupled from its pre-custodial requirement and used as a generalised sanction, it would be difficult to limit the discretionary jurisdiction in sentencing by judges as advocated by the Expert Group (1999). If the sanction was to be used as suggested, significant costs would follow upon the expansion in the use of the sanction. Moreover it is probable that a greater number of offenders might enter into prison upon breach if the scheme was used as a generalised penalty. Accordingly any further discussion upon the uncoupling of community service from the pre-custodial requirement must specifically address the significant costs attendant upon such expansion and the likelihood of increasing the number of committals to prison.

When questioned about the likely practices which might result from decoupling community service from the prior custodial requirement, a number of judges expressed a preference for it as follows:

45 The study seems to identify one District Court area where this practice is prevalent. The data may have been skewed as a result of this practice in this particular District Court area.

> "I would certainly use it more often if community service orders were available as penalties in themselves …I very strongly have that view" A2J1DC

> "Well I think you could certainly consider it in far many more cases than you would do at present". A1J5DC

In the survey, a contrarian view was expressed on the likelihood of breaches of a stand alone community service order ultimately leading to a term of imprisonment:

> "I don't think so. I think if it were available more widely, that it might actually avoid people going into custody. There clearly has to be a way of enforcing it or dealing with the case otherwise if the defendant doesn't comply with the order. But if it's de-coupled from having to presuppose a sentence, then it's not a case where automatically there would be a sentence if it is not complied with."A2J1DC

He suggested that even a fine might be the penalty for not complying with community service.

Issues about sentencing and an apprehension that judges would use community service orders inconsistently were articulated in the Senate Debate when Senator Ryan asked if there was "anything which could be done to get some sort of even-handed interpretation of this" by Judges (Senate Debate, vol.101, cols. 875-876, 7th July, 1983, Senator Ryan). The Minister for Justice replied that sentencing was a matter for the Judiciary but the President of the District Court could call a meeting a discuss the matter with District Justices under the statutory meeting procedure pursuant to the Courts (Supplemental Provision) Act 1961. However, it should be pointed out that while the procedure for meetings to discuss sentencing might facilitate a discussion upon issues relating to consistency in sentencing there is no requirement upon those attending such meetings to perform their function in a manner other than within the legal requirements. Discretion in this regard remains unfettered. The only requirement in respect of community service orders is that the Judge must have in mind a custodial sentence before deciding to impose a community service order instead.

Inconsistency may arise in the case of community service orders under a number of headings. Firstly, there is the issue of equivalence between the number of hours to be performed under a community service order and the alternative custodial penalty. As previously noted, Walsh and Sexton (1999) found significant variation between Courts on

this ranging from 63 hours to 11 hours equivalent to 1 month imprisonment with 27 hours as the national average. Secondly, some Courts may have imposed community service in lieu of what would otherwise be a non-custodial penalty although in the actual order made a custodial alternative is specified. Thirdly, the use of community service orders in the higher Criminal Courts, where the maximum number of hours is fixed by statute at 240 hours, imports the possibility that the alternative custodial penalty if greater than 12 months would upset the equivalence between 240 hours and 12 months imprisonment as the benchmark for consistency. Fourthly, in rural areas the courts were identified as more readily willing to impose community service orders for less serious offences, such as less serious assaults and driving offences and the same courts impose shorter alternative periods of imprisonment on average at 4 months compared with 5.6 months in urban areas. Walsh and Sexton (1999) suggest this may be due to a combination of factors and not one single factor.

The relatively low use of community service by sentencing courts in Ireland was further reported upon by the Comptroller And Auditor General in 2004 and more recently by the Department of Justice, Equality and Law Reform in a value for money report (Petrus VFM) in 2009. Both reports expressed a consistent view that community service as an alternative to the custodial sentence was underutilised when compared to the overall number of custodial sentences given and in light of international comparisons. In particular, the Petrus Report (2009) found that only 1158 community service orders were made for all courts in Ireland in the year 2006. A further important finding showed that the distribution of community service orders across the courts, which were overwhelmingly District Court orders , was quite uneven. A significant number of these courts rarely or never impose a community service order while a relatively small group of courts utilise the sanction with much greater frequency.

Of particular interest in the Walsh and Sexton empirical study (1999) is the stated alternative penalty contained in each order which is extrapolated from the very adequate sample used – the national average for length of substitute prison term is 5.1 months.[46] The

46 (P. 35.2) The variation among the larger Court areas is notable. Of these Limerick is the highest at seven months. Dublin is not too far behind at 5.8 months. Cork city however, comes in below the national average at 3.7 months. Tipperary/ Waterford at 3.1 months, Wexford at 1.8 months, Kilkenny at 4.2 months and Kerry at 4.9 months).

national average length of community service orders is one hundred and forty-one hours subject to regional variations which showed relatively little main areas of population.[47]

A certain caution is called for when comparing the average length of the substituted prison term of 5.1 months per community service order. This may, in part, be explained by a tendency for individual courts to adopt an elastic approach to the issue of equivalence between the number of hours to be served and the prescribed alternative period of imprisonment.

Without access to the appropriate data it is speculated that the terms of imprisonment imposed at the various sentencing courts reflect the wider sentencing patterns of these courts as courts which normally tend to severity or leniency as the case may be. However, without the requisite comparative data such a view must remain speculative.

While Jennings claims that community service orders are frequently made in the Circuit Criminal Courts (Jennings 1990:192), she does not supply any data on this point.[48] However, Walsh and Sexton (1999) in their comprehensive sample found that only thirteen (4%) of community service orders surveyed were imposed in the Circuit Criminal Court and one in the Central Criminal Court. Of particular interest is the fact that four of the thirteen community service orders made by the Circuit Court were made for District Court Appeals and therefore were limited to District Court sentencing jurisdiction. [49]

Therefore out of 269 community service orders examined for the year in question, nine were made in the Circuit Court and one in the Central Criminal Court following a trial or a plea of guilty at first instance in those respective courts. Their study further discloses that even in the nine cases which were exclusively disposals at first instance, none but one were

47 (P.36.1) - the averages for Dublin, Limerick and Cork are: 147 hours, 150 hours and 142 hours respectively.

48 In the year 2005 community service was used in 99 disposals out of a total of 2258 in the Circuit Criminal Court or 4% of all disposals. In the same year 2005 in the District Court, community service was used as a disposal in 1244 out of a total of 302134 summary cases or 0.41% while 9959 or 3.3% of cases were disposed of by way of custodial sentences for the same category of summary offences. Community service was used as a disposal in 766 or 1.85% out of a total of 41,374 indictable cases disposed of summarily in the same period. While 8493 or 20.53% received custodial sentences in the same category of disposals (Courts Service Annual Report 2005:87-90 extrapolated statistics.) In 2006, 29 courts accounted for 80% of the CSOs and just 12 courts accounted for 60% of the total number for 2006 out of a total of 112 courts. Thus the distribution of community service as a sanction across the entire system of courts in Ireland is skewed in favour a very limited number of courts i.e. relatively few courts utilise the sanction as a regular sanction (Petrus VFM Report 2009:38). In 2007, community service was used by the District Court for 9.7% of indictable cases as a final disposal of custodial cases and was used for 11.2% of summary cases as a final disposal in custodial cases (Petrus VFM 2009:38).

49 (P. 36.2) the sample used by Walsh and Sexton in their study sampled one in four community service order files for a specific year, using two hundred and sixty-nine files out of a total of one thousand and ninety-three for the year from the 1st July 1996 to 30th June, 1997.

made which provided for a substituted term of imprisonment in excess of twelve months and in one case the alternative prison term was unspecified in a case where two hundred hours community service was imposed, the accused had no previous convictions and the offence was for issuing twenty-six false receipts (Walsh and Sexton 1999:66). The use by the Circuit Criminal Court of community service orders in the sample above did not "break out" or exceed the sentencing jurisdiction of the District Court even when the sentencing jurisdiction of the Circuit Court at first instance trials allowed for an alternative term of imprisonment for periods in excess of twelve months to be made.

Geographically the Circuit Courts which use community service orders were clearly identified for prevalence. In particular, no community service order was made by the Cork Circuit Criminal Court, although the neighbouring Circuit, the South-Western Circuit comprising the Counties of Kerry, Limerick and Clare made seven out of the total fourteen community service orders. This would seem to indicate a particular preference by the sole Judge sitting in the South-Western Circuit during the period of the sample in 1996/7.

The single case in the Central Criminal Court was somewhat complicated. The accused was found guilty of rape and was sentenced to seven years imprisonment. However, the Court said it would review sentence after one year with the defendant remaining in custody for that period, and at the review date asked that a report as to suitability for community service be provided also. On review the Court made a community service order of two-hundred and forty hours and suspended the remaining six years. Walsh and Sexton correctly criticise such use by the Central Criminal Court of the community service order procedure, where the Central Criminal Court combined the community service order with a part-suspended sentence on the grounds that the Court may only make a community service order in respect of the offence for which an accused is convicted instead of dealing with him in any other way (Section 3(1), Criminal Justice (Community Service) Act 1983).

One reading of section 3 (1) of the Criminal Justice (Community Service) Act 1983 would disallow the combination of any other form of penalty with a community service order such as a fine or a suspended sentence. When read in conjunction with section 2 the community service order is allowable solely as a substitute for a custodial sentence. The words in section 3 "instead of dealing with him in any other way" appear to be words of exclusion which prohibit the use of the sanction in combination with any other sanction.

The case in the Central Criminal Court is unique but the case may also be instructive in revealing a tendency on the part of the Irish judiciary, particularly the Judges of the Circuit Court and the Central Criminal Court to adopt non-statutory or organic approaches to sentences, some of which may have been developed to counter penal exigencies, such as early release by the prison authorities of serious offenders sentenced to long terms of imprisonment, due to prison overcrowding. In the example given in the Walsh and Sexton study, the Central Criminal Court clearly was minded that the accused would serve a custodial sentence for the first year but was open-minded about the sentence for the remainder of the period. This tendency to experiment with sentencing by the Circuit and Central Criminal Courts has been criticised by the Supreme Court in O'Brien – v – Governor of Limerick Prison [1997] 2 ILRM where the Court pointed out the risks of combining judicial and executive functions in the supervision of sentences by the Courts. This will be further discussed in chapter 6 in the discussion on part-suspended sentences.

In the present survey of judges, one judge of the Circuit Criminal Court gave an example of the use and development of such organic practices when he explained the manner in which he makes community service orders. The resulting sentence appears to be a hybrid or combination of both community service and a suspended sentence. He put it thus:

> "I impose community service in a rather odd way. Very often what I do is this. Even though community service is supposed to be given in lieu of a prison sentence, I impose what I call "work to be done in the community" in lieu of a condition of a suspended sentence. What I would do for example, I would give him 3 years. I would suspend those 3 years on certain conditions.
> 1. Of course that he would keep a bond to keep the peace and be of good behaviour for 3 years.
> 2. If he was a drug addict he would report drug treatment to us.
> 3. That he would do work in the community to the amount of 240 hours…I have been doing that for 7 years and I haven't been challenged on it."A7J3CC

The use of community service orders by the Circuit and Central Criminal Courts in the Walsh and Sexton study reveals that they are rarely, if ever, used as a substitute for a prison term at the sentencing jurisdiction of these Courts. Perhaps this might be explained by reference to the issue of equivalence between the maximum number of hours which can statutorily be made at two hundred and forty hours community service which period of community service is the same maximum for each jurisdictional level on the one hand and the variable maxima of imprisonment terms which may be imposed by the criminal Courts

at each jurisdictional level. The District Court has jurisdiction to deal with a wide range of indictable offences in any case where both the accused and the D.P.P. have consented. In these cases the District Court can impose a maximum sentence of twelve months on a single count, or twenty-four months where sentence is imposed on separate counts to run consecutively. The sentencing maxima of the Circuit and Central Criminal Courts are far in excess of twelve months. Depending on the specific offence, the Circuit Criminal Court has the power to sentence many offenders convicted of offences tried before it to terms of imprisonment for life.

The writer is aware of one case in Cork where the Circuit Court Judge was minded to impose a community service order of seven hundred and fifty hours in lieu of three years imprisonment in respect of one offence, until it was pointed out that the statutory maximum was two hundred and forty hours no matter what alternative term of imprisonment might be in contemplation. While a convincing argument can be made for scaling the hours in a community service order relative to the length of the substitute term of imprisonment the scale of equivalence breaks down in respect of sentences for the Circuit Criminal Court unless the Court deals with the offender as if it were sentencing at District Court jurisdictional level only. The empirical studies conducted by Walsh and Sexton (1999) shows the national average of community service is twenty-seven hours for every period of one month imprisonment.

The issue of equivalence was specifically raised by one of the judges in the survey who deals solely with indictable crime when he said:

> "you see the thing is the Act doesn't make a difference for a crime that is purely summary or community service and serious indictable crimes. … for serious indictable crimes the period worked could be longer … double it … at least maybe 500 hours." A7J3CC

If such was provided for in the Act it would be used more extensively he opined.

The empirical study conducted by Walsh and Sexton (1999) discloses that community service, when implemented, was used by courts in a manner which was much in keeping with the anticipated categories of offenders and offences enunciated by the parliamentarians. They also found that community service was applied quite unevenly across the country, showing differences between rural and urban sentencing Courts. The

categories of offences for which convicted persons were given community service showed a consistency with international experience with larceny offences clearly identified as the primary category of offences for which community service orders are made (Walsh and Sexton 1999:41). The authors expressed some surprise when considering road traffic and vehicle offences which move into second place ahead of offences against the person. Of those convicted of less serious assault, 70% had no previous criminal record. A further 11% had only one previous conviction. Of those convicted of driving offences, 45% had no previous criminal record and a further 31% had only one previous conviction. By comparison, of the offenders convicted of larceny, 41% had no previous criminal record and a further 17% had only one previous conviction. These figures lend support to the proposition that some Courts may be inclined to impose CSOs in situations where a custodial sentence might not have been imposed had the CSO option not been available (Walsh and Sexton 1999: 42).

THE POSITION OF COMMUNITY SERVICE AS A PENALTY WITHIN IRISH SENTENCING LAW AND PRACTICE

In an effort to locate community service as a sanction in the continuum of Irish sentencing practice, perhaps it is useful to see community service orders in a wider context which would include such factors as societal support for community based sanctions, the function and operational standards of the Probation Service in relation to community sanctions, the consistency in the use by the Courts of certain non-custodial sentences, the functionality of a rising, constant or falling crime rate and the relative use of imprisonment by the Courts.

Significant support for community based sanctions was reported by the National Crime Forum First Report (1998) as follows:

> The strong thrust of the presentations made to the Forum was that community-based sanctions should be used whenever practicable and prison regarded as a last resort. If there was one point on which there was virtual unanimity, it was that imprisonment is not a successful strategy for reducing crime (National Crime Forum 1998: 139).

This view was reinforced in a study by McDaid (1999) where he found 73% of those surveyed supported non-custodial sanctions, such as fines, community service and probation in preference to custodial penalties for certain crimes. The survey also found significant support for rehabilitative measures rather than punitive measures for juvenile and drug-related offending.

The National Crime Forum sought to place prison in the sentencing continuum as follows:

> The Forum endorses the call for a fundamental change of focus to make prison the option of last resort, to be used sparingly and only when all other options have been tried or considered and ruled out for cogent reasons (National Crime Forum Report 1998:142).

In contrast with these soundings of social attitude to the use of imprisonment in the period 1997 to 1999 in Ireland, the imprisonment rate of prisoners per 100,000 of the general population rose by 23% (Walmsley 1999) in contrast with England and Wales where the figure was 4% and 1% in Scotland.[50] Moreover this staggering rate of increase in the imprisonment rate was accompanied by a stabilising or falling crime rate in Ireland during the same period. The political background to this phenomenon included a general election which was largely fought on the rhetoric of zero tolerance, a model of strict policing technology imported from the Eastern United States, which at a superficial level promised a significant reduction in criminal behaviour. However, the falling crime rate was well established before the Fianna Fail led Government which promoted zero tolerance as a policy came into power in 1997, leading some writers to contend that tough sentencing measures such as "zero tolerance" and "three-strikes" may not have direct applicability to the decrease in the crime rate in Ireland during that period (O'Donnell and O'Sullivan 2001). The decrease in the crime rate may have been affected by another factor which was central to the debate to introduce community service in 1983. The issue of prison over-crowding and the constant need by the Department of Justice and the Prison Service to shed prisoners from the prisons to allow for the intake of more recently committed offenders was partially addressed after the murders of Garda Gerry McCabe in Co. Limerick and journalist Veronica Guerin in Dublin, by an extensive prison building

50 O'Donnell (2005:7) however has demonstrated the rate of imprisonment in Ireland has not grown at all in the period 1992-2003. Instead, he claims, it has fallen sharply. He attributes the relative stability in the prison population or any growth thereof not as an increase in the rate of committals per 100,000 of the population but to other factors such as restrictions on the right to bail, longer sentences and increased remands of illegal immigrants.

programme commenced in 1996. The incarceration of repeat offenders who would previously have been released under the "revolving door" policy may have had a moderating effect upon the crime rate. If one was to use the method suggested by Tarling one could expect a 1% decrease in the crime rate for every 25% increase in the prison population (Tarling 1994).

Socio-economic factors may also have played a moderating role on the decrease in the crime rate in the late 1990s particularly the move towards historically low rates of unemployment on the back of a burgeoning tiger economy which Ireland experienced for the first time in the mid to late 1990s.

Despite the views expressed in surveys of public attitude such as that conducted by the National Crime Council Forum (1998) and more longstanding exhortations made by Whitaker (1985), the courts may not have utilised the community service order with the same degree of zeal and consistency to avoid using the custodial sentence as a sentence of last resort. Any discussion upon the use of the community service order as presently constituted, must include a discussion upon the use of the custodial sentence generally, so closely is the former structurally associated with the latter. Whatever may be said about the growth in the prison population what is beyond dispute is that the use of community service as an alternative to the custodial sentence is relatively infrequent and under-utilised and this is not solely due to the unsuitability of offenders with addictions. Perhaps a more fundamental issue presents here. Is it possible that a significant number of judges do not utilise community service as an alternative to the custodial sentence simply because they do not regard the community service order as a genuine alternative to a real custodial sentence and are therefore reluctant to use the sanction?

As will be disclosed presently, the judges in the focus groups and interviews expressed an overwhelming preference to have the discretion to impose a community service order without the restricting effect of sec. 2 of the Act. The confluence of these views with the recommendations of the Expert Group to allow the use of a community service order as a stand alone penalty presents a challenge to the decarcerative policy originally intended for the sanction. While Walsh and Sexton claim to have identified a partial deviation from the requirements of sec. 2 of the Act, this study confirms such tendency on the part of some judges to utilise the sanction expansively also.

But when the relatively low level of usage of community service generally is considered in light of the strongly expressed preference by judges to allow community service as a sanction in itself, it is possible to discern a much more fundamental issue. This relates to the reluctance of some judges to subscribe to the principle that community service should ever be used in place of a real custodial sentence. It is difficult to come directly to this conclusion from the replies which will be disclosed presently. However, the statistical data disclosed in the Comptroller and Auditor General survey in 2004 and the Petrus Value for Money report (2009) both point to significantly low displacement of custodial sentences by the substitution of community service .

However, it is possible from the focus groups and interviews to identify factors which may be seen to promote the greater use of the sanction. Moreover, some discrete issues are identified which inhibit the use of the community service order. This study reveals a certain consistency with the Walsh and Sexton Study (1999) where the sanction is primarily found to be used in the District Court for offences which by virtue of that Court's jurisdiction are relatively minor. However, within that jurisdiction, the sanction is utilised for offences at the more serious end of the scale.

How do the Courts use the Sanction?

As previously noted, one of the most significant issues to emerge in the study was the strong desire by judges to utilise the sanction as a penalty in itself and without reference to any custodial consideration. The relatively low use of the sanction generally might suggest that judges are reluctant to depart from the strictures of sec. 2 of the Act by using it nonetheless as a stand alone penalty as if sec. 2 did not apply. On the other hand the same low level of usage at present might equally point to a reasonably widespread view among judges that community service is not a realistic alternative to an actual custodial sentence at all. Consequently some judges may not subscribe to the principle that community service can displace the custodial sentence and hence they do not use it as such.

One interviewee judge put the choice of community service as a sanction in stark terms – "is it custody or is it not" A8J1SC. He opined that community service as an alternative to

custody "made no sense at all" (A8J1SC). Notwithstanding the general public sentiment that non-custodial sanctions should be used in preference to custody (National Crime Council Forum 1998) it is evident from the annual statistical returns on sentencing that the courts are far from enthusiastic to adopt such an approach to sentencing (Courts Service Annual Report 2004,2005,2006). Moreover, the general use of community service since 1984 has remained consistently low relative to custodial sentencing during the same period. In 2006 only 1158 community service orders were made in total by all of the criminal courts in Ireland (Petrus VFM 2009).[51]

But how would one know if a custodial sentence was originally intended when community service is applied as a sentence? Senator O'Leary's cautionary comment that sentencers often threaten to send a person to prison without really intending to give effect to such admonitions is apposite when considering the intentionality of sentencers to impose community service orders.

The judges' responses to questions on the likely outcome of breach proceedings were analysed to discern the original intention to genuinely substitute a custodial sentence with the alternative of community service.

In the qualitative study of judges` practices and intentions, those interviewed with few exceptions held strongly to the view that once a case is returned to court for an alleged breach of community service the sentence of imprisonment is invariably imposed upon a finding of breach. This suggests that a custodial sentence was actually intended originally and was then substituted by community service. These views were expressed notwithstanding the power of the court to deal with the offender "in any manner" under Sections 7-11 Criminal Justice (Community Service) Act 1983. In support of this the following views are taken from the study:

> "I would deal with it punitively."A1J9HC
>
> "Instant incarceration."A1J7DC
>
> "Similar … orders are indivisible."A1J5DC

[51] The Petrus report reveals that community service is not utilised in a significant number of courts and court areas.

"Definitely a term of imprisonment"A1J1DC

"Almost without variation I impose penalty in full."A4J2DC

"Normally I would impose the sentence … no discount for time served."A2J1DC

While others took a more nuanced approach:

"…if there is a total breach or non-attendance and the fellow won't get up in the morning then I just abandon the whole thing and send him to prison… if the offender has gone a good measure of complying then you give him the "fall of the trick", read the riot act to him and start again."A5J1CC

"It depends on the breach. To impose the original sentence it would take a major breach … very often they would have a reason whatever it is ; my mother is sick or my girlfriend is pregnant or the child was sick or something like that. If they are sufficiently well represented by somebody particularly articulate, they may well overcome any difficulties they have. It depends on the circumstances."A3J1CC

"I would adjourn a breach summons. If no effort is made at all I would invoke sentence."A6J1DC

"If there is a half genuine reason for not completing the order, I in most cases, give time to do it."A2J1DC

"If he simply fails to in total to turn up and do his community service then he serves the sentence. He's the fellow who just thought he got a free pass and he needs to be shown. If there are reasons why he has done most of it, that something happened, then you look at it. Maybe there might be a slap on the wrist. Maybe he serves a portion of the sentence."A7J1CC

Ultimately both groups above subscribed to the imposition of a custodial sentence upon breach and generally were not prepared to deal with breaches except by reference to the custodial option notwithstanding that they could have simply ignored the breach or imposed a fine instead. This lends support to the conclusion that community service is applied in Ireland as a decarcerative procedure in conformity with the requirements of sec. 2 of the Act.

The qualitative data of this study discloses that community service is a sanction which is used predominantly in the District Court. When the sanction is used in the Circuit or

Central Criminal Courts or in the Court of Criminal Appeal it is utilised somewhat differently.

In the survey of judges for this study a selection of judges at each jurisdictional level offered the following responses as to who was suitable for community service orders.

At District Court level:

> "only where serious offences have occurred and there are significant previous convictions." A1J5DC

> "repeat offenders, say no insurance, repeat offenders for drunk driving. But I prefer not to imprison". A1J6DC

> "It has to be serious enough to put them in prison". A1J4DC

At Circuit Court level:

> "for young persons… to bring them back into control because of the disciplinary requirement of the community service order…for somebody on the verge of prison but this might help to keep him out… ok lets give him a chance." A3J1CC

> "for somebody who normally had to go to jail but who after long years of criminal activity is now showing some signs of common sense and direction." A7J3CC

> "I don't see a community service order as a weapon to deal with a drug habit." A7J2CC

At High Court level:

> "… when it is undesirable to subject an individual to a custody regime where he is going to come out worse than when he went in…I would consider most of my cases unsuitable because of the nature of the cases I am concerned with. I might personally wish to dispose of a case non-custodially but in relation to rapes and homicides it is found unacceptable to society in particular whipped up by the tabloid press". A8J1HC

At Supreme Court level:

> "…in the Court of Criminal Appeal … there wouldn't be many cases there that would be suitable because of the degree of gravity. … I think of clients I have had myself, a large number of people

who might be suitable for it because they are totally disorganised and unstructured, incapable, for example, of turning up for an appointment."A8J1SC

Thus, the matrix of considerations outlined above discloses that community service may be indicated for a number of reasons which relate to the seriousness of the offence both as a threshold and as a ceiling to the use of the sanction as well as the particular characteristics of the individual offender.

Profile of Offenders Given Community Service

The reduction in the rate of unemployment among offenders was offered by the Probation Service staff as a reason for a decline in the extent to which community service orders are used by courts (Walsh and Sexton 1999). Paradoxically, when the measure was discussed in the Oireachtas in 1983, the possibility of losing employment due to imprisonment was advanced as a positive advantage for using community service over imprisonment. It should be recalled that this was also a reason given in the Wootton Report (1970) to allow offenders the opportunity to work off a community-based penalty during "leisure-time" and not in substitution for a period of employment, training or education. The explanation might be advanced that greater employment opportunities open to offenders present as an excuse for non-performance of community service rather than a reason for the courts not using the sanction for suitably employed offenders during their leisure-time.

However in the survey the judges expressed a clear preference to engage those who were unemployed and otherwise suitable in community service schemes to facilitate the experience of regular work and the discipline required to hold down employment:

"… I think that the community service orders tend, in my very limited experience, to apply to people who maybe haven't had a whole lot of education and haven't had a start in life …"A1J2DC

"I suppose really it starts the disciplinary process and getting people back on the straight and narrow. It's probably connected, I would think in the type of work that the Probation Services do, except that they have particular programmes. The community service work is under certain directions and it's really part of people correcting their lifestyle."A3J1CC

"I take it on the basis that I impose the community service order where he would be a recent offender on indictment and where having listened to the plea in mitigation that I feel that perhaps jail would not be the option that he would not be of a high risk of re-offending but at the same time a penalty would have to be imposed to make him realise the seriousness of what he was at and also to give him some guidance and structure in his life. Very often it is not there …"A7J3CC

"The fact that somebody has to do something under supervision, work or even attendance. As you know, merely turning up to do something is so alien to a lot of young offenders in particular, that it puts a pattern or a discipline in their lives which they otherwise unfortunately don't have."A5J1CC

While those with serious addictions were invariably excluded:

"Drugs, serious alcohol, a total waste of time. Because with the drug scene they have to be stable. And whether that's going to happen or not it is too far down the road. With the drink, repeat serious chronic alcoholics again I consider that a waste of Probation's time. I tend to hit with a fine in those. Let them get on with it. They'll be back."A1J4DC

However these views are not to be interpreted as meaning that the judges did not consider community service for persons in employment. Some judges identified community service as a method of punishment while the offender remains outside of the prison walls and supporting a family:

"I really do it to someone who has got work. I want to keep them at work. I want to teach them a lesson. … take for instance you may have a no insurance case for maybe a third time. You might have a drink driving. There are a few there that are serious enough to put them in but I prefer not to imprison. .... I prefer to keep them at work. Ok it might pain them to get up on a Saturday morning …"A1J4DC

Managerial considerations also have a role to play when considering community service is selected as a sanction. Some of the judges stated a marked preference to use community service only upon a plea of guilty and were reluctant to use the disposition at all following a finding of guilty in a contested trial:

"Well community service insofar as I would be concerned would be where somebody had pleaded firstly and pleaded in early course and regarding his personal circumstances…If after a trial he was convicted I would be very loathe to impose community service."A7J3CC

The offender was presented in the replies as one who was disposed to help him/herself while offering an early plea of guilty, by ensuring continuity of employment while not entering into custody or by acquiring the habits of punctuality and compliance in the performance of a community service order where the offender may be unemployed.

Risk

Generally, the judges were inclined to use community service as a sanction where the risk of re-offending was low. In the study, the judges disclosed that they apply filters in the selection of offenders for community service. The process of selection of suitable candidates for community service turns on the fulcrum of considerations of risk to the public or specific victims and ultimately the seriousness of the offence and the offenders' antecedent behaviours.

The offences which are deemed to be generally unsuitable for community service and more deserving of a custodial sentence tend to fall into a category where imprisonment is perceived to be the most appropriate disposition. In the responses given by the judges, the issues of a proportionate sentence or desert and risk containment compete for supremacy in the formulation of the sentence. A certain selectivity of shallow end, non serious offenders for community service is suggested in these responses. The residual offenders deemed unsuitable by reference to their class of offences seem destined not to be diverted away from the prison. Notwithstanding the availability of community service as a diversionary tool of sentencing, those deserving of a prison sentence will, generally speaking, receive a prison sentence. The judges seemed to be averse to incorporating the element of risk into a community service order. Rather, if such risk was identified the balance would generally tip in favour of a custodial sentence.

One judge spoke of the alienation between the offender and society in general and the difficulties in engaging the offender meaningfully in any non custodial sanction:

> "A lot of these young fellows are totally, I won't say excluded from society, but they haven't got a job. They never got on at school and they associated with like-minded (individuals) as themselves and this maybe puts them into some different places."A5J1CC

When pressed what confidence he had that the Probation Service would carry out the courts wishes or orders in the supervision of such offenders he replied:

"I think I started out by saying I don't use these very often."A5J1CC

Thus he indicated an overall dissatisfaction and disapproval of community service as a realistic alternative to custody.

Judges are not trained or invested with any higher aptitude to assess risk. Whether judges acquire an enhanced ability to assess risk through experience remains an open question. Indeed one of the respondents below specifically refers to her lack of experience but applies the template of "risk to society" as a central feature when deciding to apply an immediate custodial sentence or to substitute this with a community service order.

While incapacitation as a goal of sentencing has always received official disapproval (Law Reform Commission 1996:20, People (A.G.) –v- O'Callaghan [1996] I.R. 501), in practice judges tend to address the issue of risk when they consider the suspension of a sentence or the substitution of a custodial sentence with a community based sanction such as community service. Risk is essentially the calculation of the occurrence of potential dangers in the future and the application of controls to avoid such occurrence (Garland 2003:51). These latter controls in the context of sentencing manifest themselves as an incapacitation of the offender to visit further danger upon the public or specific victims. It is not to be unexpected that actors in the criminal justice system such as judges will apply "the precautionary principle" when deciding upon sentences as they would in other aspects of their lives. But the critical issue is that they would not be overwhelmed by a perception that society is essentially and always a dangerous place (Beck 1992). Accordingly, when judges consider risk in the overall matrix of considerations when sentencing, the issue of risk may occupy a more elevated position of priority than it might otherwise deserve.

Although incapacitation may be not expressly the aim of sentencing by judges, it may be the result of sentencing in some instances. When questioned on what category of offences would generally be considered unsuitable for community service, the judges tended to agree that offences against property, road traffic offences and repeat public order offences would be considered suitable. In contrast, crimes of violence and possession of drugs for the purpose of sale and supply (section 15, Misuse of Drugs Act, 1977) *simpliciter* would not be generally suitable:

"I would be slow in crimes where there is violence to the person because I think that a very individual victim is picked out as against the wrong to society. Where violence is in question I would be very slow to give community service."A4J4DC

"… or where the offence is drug related particularly which I would consider for a very minor section 15, I would be terrified that that person would see his friends on a community service scheme as being a possible customer base."A4J2DC

"I am only starting out but my view of it would be … one of the issues is danger to society and if the individual is such … "A1J4DC

"I would tend to apply them in cases where e.g. they were repeat public order offenders. Maybe not of the very highest level but maybe 2 or 3 or 4 times." A1J3DC

"I wouldn't give it for section 15 of the Misuse of Drugs Act. I wouldn't give it for counterfeit currency. I wouldn't give it if where was any serious violence inflicted upon the person. They'd be 3 areas where I normally would not … because I knew that these sort of offences merit incarceration and it's a matter of protection of society."A1J1DC

"I would possibly consider a community service order particularly if his crime is against property something of that nature … "A6J1DC

"I tend to look at the person in a lot of cases."A7J1CC

In summary , the use by the Courts of community service as a sentencing tool is quite consistent with the original views expressed in the White Paper (1981) and the anticipated target groups of offenders and offences identified by the Minister for Justice who piloted the Bill through the Oireachtas and those few speakers in both Houses who sought to identify the most likely candidates for community service.

Clearly, serious offenders are not given community service in the Irish criminal justice system, which offenders are categorised by the jurisdictional level of the court of trial. The District Court may only try cases which although indictable are considered minor in

nature. The District Court tries c.96% of all indictable cases in this way and may impose a penalty of up to twelve months imprisonment for any one offence.

In the second stage of the Debate in Dail Eireann a number of speakers who had reservations about community service expressed concerns that the courts would be allowed adopt a "softly softly" approach such as giving offenders a choice (Mr Wyse Dail Debates, vol. 341, col. 1927, 26th April, 1983) and that "it seems to be a step further in making apologies for those found guilty of offences" (Dail Debates vol. 342, col. 152-153, 3rd May, 1983, Mr Tunney). Although these views were expressed in general about the use of community service, the speakers were not specific in differentiating between serious and non-serious offences.

Community service orders have been in use in the Irish criminal courts for over twenty years and are now an established sentencing feature in the courts' range of penalties. The dynamic social and economic changes which have transformed Ireland over the past twenty years have also been accompanied by changes in the criminal justice system which has not remained static either. Some elements of "the crime complex" are discernable in sentencing practices in Ireland where the courts impose community sanctions on offenders rather parsimoniously compared to the number of offenders given prison sentences. The ratio of offenders on community based sanctions (which includes community service) to offenders on custodial sanctions varies internationally. In Ireland 1.3 persons were given some form of community supervision for every person committed to prison. In England and Wales, Australia and New Zealand roughly 3 such offenders were given community-based sanctions compared with every person given a custodial sentence. (Comptroller and Auditor General 2004 21-22).[52] Apart from the penalties of fines and probation orders, the Irish criminal courts tend to maintain the sentence of imprisonment as the invariable benchmark to measure a sentence, which practice may yield an unusually high number of persons committed to prison when measured against other more commensurate penalties.

52 It should be noted the rates of imprisonment in the countries England and Wales, New Zealand and Canada were in the range of 120-150 per 100,000 of population; whereas in Ireland, Finland and Northern Ireland the countries comparable for community service ratios, the imprisonment rate varied from 56 to 76 per 100,000.

Why is the sanction not used more often?

As noted previously some judges appear reluctant to accept the principle that a sentence of imprisonment which is genuinely contemplated may be substituted by something else, such as, community service. These perceptions may also be influenced by considerations of risk in the selection of offenders suitable for community service. In the courts which deal exclusively with indictable offences the fixed upper limit of 240 hours community service is perceived to be too lenient by far for substitution of sentences in excess of twelve months imprisonment. In short, community service by virtue of its upper limit of hours becomes disproportionately lenient in the disposal of indictable offences. For example a sentence of five years imprisonment for armed robbery can be substituted by community service of 240 hours at a maximum. Similarly a sentence of five months imprisonment for common assault in the District Court may be substituted also by the same maximum of 240 hours community service. The greater the extent that this disproportionality is manifest there is an increased likelihood that community service will not be used.

Besides these more obvious factors which bear upon the use or non-use of the sanction, the study pointed to some less obvious factors which may inhibit the wider use of the sanction.

(1) *Ownership of the sanction*

It is hypothesised in this study, that the reluctance by sentencing courts to make greater use of community-based sanctions such as probation orders and community service orders in preference to supervision during deferment, is more closely related to the reluctance by courts to impart the function of supervision to the Probation Service and correspondingly to retain such supervision to the courts themselves. This tendency by the courts to extend the scope of supervision, as a function of the sentencing process of the court itself, may account for the increase in adjourned supervision by the courts and a decline in the use of community service orders and probation orders. Structurally, a community service order and usually a probation order are functions handed over by the court to the Probation Service without further input by the court except in cases of non-compliance or breach proceedings. Increasingly, the Irish criminal courts have extended the control and supervision of offenders by the use of non-statutory procedures, some of which have been criticised by the Supreme Court as trespassing upon the proper function of the Executive by the Judicial arm of Government. In the Circuit and Central Criminal Courts, the practice of imposing a custodial sentence and then adjourning the case for review became

established, in part to ensure that an accused person at least served part of his/her sentence in custody without being released by the Executive at an early stage. This practice clearly emerged in response to the "revolving door" practice in the 1980s and early 1990s of releasing prisoners sometimes convicted of serious offences, within very short periods of time after committal by the sentencing court.

It is noted that community service orders in the Circuit Criminal Court are sometimes called back to court to see if the offender is properly performing the community service (Walsh and Sexton 1999) rather than allowing such a function to be performed solely by the probation officer who has the power to bring the case back to court in cases of non-compliance or breach.[53]

The continuous approach of the Circuit and Central Criminal Courts to resist "letting go" of a case once sentence is pronounced was evident also in a limited study conducted by the writer in respect of District Court sentencing practice (Riordan 2000). In a Focus Group of Judges convened to examine the practices used by the District Court in Dublin for drug related offending one respondent expressed his reluctance to hand over the function of sole supervision to the probation officer because:

> "Nobody gets breached on a probation order in Dublin, very rarely" (Riordan 2000:40)

Another District Court Judge in the focus group explained it in this way:

> "I always prefer to have an adjourned date when he comes back into Court, it's the immediacy of that that is so effective…you are dependent on the efficiency of the Probation Service in identifying whether he has broken the bond or not, and I can't feel sufficient faith in the system to be certain that he would be brought back into court if he is in breach of the bond". (Riordan 2000:40).

Thus, one could interpret the approach taken by the Irish criminal courts to exercise a level of control over the penalties of convicted offenders as reaching far beyond the judicial domain into the executive domain to ensure compliance either by the prison authorities or the Probation Service with the relevant court orders as the case may be. What is evident from such an approach is a clear distrust on the part of Judges that the sentences, whether

53 In People (D.P.P.) –v- James O'Reilly (supra) the Court of Criminal Appeal in the final order of the court (examined by writer) specified a review of the order within 6 months to ensure compliance. This procedure was adopted notwithstanding the formal powers of the Probation Service to bring breach proceedings under Sections 7 &8 Criminal Justice (Community Service) Act 1983 in the event of non-compliance.

custodial or non-custodial, will be implemented in the manner intended by the court. Neither the Expert Group on the Probation Service (1999) nor the Comptroller and Auditor General (2000) identified this fractious relationship between the Probation Service and the Courts which may have a significant bearing upon the tendency by the Courts to use community service orders with any degree of frequency.

On the other hand it is arguable, that these practices of the Criminal Courts to remain engaged with the convicted offender, without relinquishing such functions to the Prison Service or the Probation Service solely, are an indication of a shift in sentencing sentiment by the Irish Judges exercising criminal jurisdiction, towards a more punitive and controlling sentencing paradigm (McCullagh 1996).

In the survey one judge in the Central Criminal Court expressed a preference to oversee all orders made by him including community service:

> "I would monitor any order I make. … I just have a belief that the consequences of people's actions must be visited on them and that they mustn't slide into conditions of disuedude."A9J1HC

He expressed concern that such might occur if he did not supervise it. However, the practicalities of dealing with a constant flow of new cases each day presented to most judges the impossibility of supervising an offender while on community service. Though they were distrustful of how their sentences would be implemented, the stated preference for most of the judges surveyed, particularly in the District Court, was to leave it to the Probation Service to bring infractions to the notice of the court by way of the breach procedure:

> "None of our business once the sentence is imposed."A4J1DC

abruptly sums up the views of the majority of the District Court judges on this point.

Thus, once the court makes a community service order ownership of the sanction with few exceptions moves from the court to the Probation Service and primarily to the offender him/herself. If the offender fails to perform the community service the autonomy vested in him/her to complete the requirements of the sanction may be forfeited. In such

circumstances, the ownership of the sanction is again placed in the hands of the court for consideration of revocation.

Confidence by the judges that offenders will be adequately supervised while on community service is an important factor in the promotion of the use of the sanction. Moreover, the perception that serious breaches of a community service order will not be brought to the court's attention by way of breach proceedings may inhibit the greater use of the sanction. In contrast, the custodial sentence presents as a sanction which is not subject to such vagaries and conditions except of course the contingency of early release.

(2) *Judicial confidence in the penalty of fines*

The judges' views of the efficacy of the fines system may also reveal a tendency on their part to utilise the custodial sentence more often than they might otherwise wish to do. Clearly alternatives to the custodial sentence must present as realistic and operable, otherwise they will not be used. Among the judges of the District Court in the study, it was acknowledged that when fine warrants are executed for non payment, the likelihood of the offender spending more than twenty-four hours in prison is low even where the default period of custody specified is 90 days imprisonment. The judges are aware that fines defaulters when committed to prison put extra pressure on the prison system and are targeted by the Executive for early release ahead of committed prisoners .

None of the judges in the survey expressed confidence in the sanction of the fine and some gave specific reasons for this:

> "If I "fine" the particular person, I really have no knowledge what happens whether he pays the fine or not thereafter." A6J1DC

> "Fines ...in the run of situations...in high density urban areas...I have no confidence (they will be collected)" A1J5DC

> "...fines should be collected and bench warrants executed forthwith...I am gravely concerned about the traditional biscuit tin approach to warrants in which they are thrown in the station biscuit tin and largely left there." A9J1HC

Perceptions by the Judges that fines are not collected by the Gardai (Report of the Comptroller and Auditor General No. 37), the historical abuse of the scheme for petitions for clemency to the Executive per Brennan – v – Minister for Justice [1995] 1 I.R. 612, and the unfettered discretion by the Probation Service over offenders in the performance of probation orders may cumulatively have had the effect of narrowing the field of optimal sanctions which the courts regard as appropriate in sentencing offenders.

The provision of a significant increase in prison accommodation during the period from 1997 onwards should not be understated as a reason for the relative decline in the use of community service orders during this period. As a result, the use of custody, especially in light of the expansion of the prison system and its ability to receive further inmates into custody, facilitated the increased use by the courts of imprisonment as a sentencing option and not necessarily as a sentence of last resort.

Thus, the relative use of community service as a sentence by judges may be explained by reference to the use of other sanctions such as imprisonment, the fine and probation orders. Although judges use the fine and probation order regularly in the disposal of cases, their enthusiasm for such disposals is qualified by perceptions that fines may not be collected and probation orders may not be complied with sufficiently. As a consequence, the sanction of imprisonment may be regarded as the residual sanction which carries the greatest degree of certainty in its execution. Some judges remain unconvinced that community service has any real equivalence with a custodial sentence and are reluctant to use it. As previously noted, a few judges did indicate they would occasionally deploy the sanction of community service where the custodial sentence was not really intended. The community service order remains therefore a niche sanction in the overall range of sentences. Any attempt to present the community service order as the first choice of penalty over the custodial sentence or fine or probation order is critically dependent on the limiting scope of Section 2 of the 1983 Act which mandates the sanction may only be used as a decarcerative measure.

CONCLUSION

This chapter has attempted to locate the new penalty of community service in Irish sentencing policy and practice, with particular reference to the penalty of community service which had operated in the neighbouring jurisdiction of England and Wales for a decade before its introduction in Ireland. Similar exigencies in both jurisdictions have been identified, such as the growth in the crime rate coupled with an acute crisis in prison accommodation, which point to a common theme in political and official discourses. Notwithstanding the official disavowal that prison was too expensive for the punishment of certain offenders, the positive aspects of community service were accentuated in the White Paper preceding the introduction of community service in Ireland. Few if any could point to the advantages of imprisonment except for the imposition of punishment and incapacitation. However, the early release of prisoners negated that punitive and incapacitative effect. The possibility of rehabilitation or redemption in Irish prisons in the early 1980s was negligible while any special or general deterrent effect upon offenders sentenced to imprisonment could not be detected having regard to the recidivist profile of the vast majority of prisoners.

The White Paper and the Oireachtas debates were imbued with a spirit of optimism for the new way forward in sentencing. This optimism, not unnaturally, fixed upon the positive features of community service, particularly the opportunity to allow reform of the offender by rehabilitation and by reparation to the community. Notwithstanding the views of Pease and Young that community service was essentially a punitive measure, at least at the birth of such penalty in Ireland, most actors participating in its introduction, presented community service as a penalty capable of delivering upon its claims to be reparative, rehabilitative and punitive all at once. New departures generally evince a sense of optimism, even when dissembling is used to hide the true reasons for introducing any new measure. The projected cost of dealing adequately with prison overcrowding "appalled" the government of the day. This "optimism disease" which Salmon Rushdie (Midnights Children) identified at the inception of the states of Pakistan and India was not absent either when community service was introduced in 1983 in Ireland. In the succeeding years, a more sober consideration of community service emerged when the penalty settled into everyday use.

Insofar as it is possible to discern the intended class of offenders who might be suitable to receive a community service order instead of a custodial sentence, the operation of the penalty in practice could be said to have reached its target, whatever about the extent to which it may have been applied to the same target group. Community service as operated in Ireland is almost exclusively a penalty reserved for cases disposed of in the District Court where the maximum penalty on conviction is twelve months imprisonment. Various structural elements have been explored in this chapter to explain why the penalty is almost "locked" into that limited jurisdiction. In practice the possibility of using community service as a decarcerative devise for offenders to be sentenced to longer terms of imprisonment does not present in the data, leading one to conclude that the current use of community service in Ireland has achieved its target group of minor offenders who might have been given a short term of imprisonment. However, the extent to which the District Court applies the penalty of community service relative to the degree in which it actually imposes a custodial sentence suggests, when compared to international comparators, that community service is underused in respect of the same target group.

The decline in the use of community service as a penalty has been discussed in this chapter, particularly in light of the significant increase in the use of imprisonment as a penalty over the past fifteen years. Certain reasons have been put forward to explain this trend which bears upon a re-orientation of political and criminal justice perspectives. In the political sphere sentiment has hardened over the past two decades where desert based penalties are promoted and preferred while in the judicial sphere the courts have shown a growing preference to supervised sentences, whether by way of review of sentences or deferred supervision, which presents a departure from an earlier era where finality and therefore certainty, at least as to the meaning of the sentence, whatever about its execution, was the norm.

Since its inception in 1983 the community service order has always been presented within the statutory framework as a direct substitute for an actual custodial sentence. However in the following chapter the first attempted rupture of this policy is analysed in respect of children aged 16 and 17 years under the Children Act 2001. In this legislation, community service is seen to emerge as an intermediate sanction without consideration of the prior custodial requirement.

CHAPTER 4

"CONFUSION NOW HATH MADE HIS MASTERPIECE" (MACBETH Act. II Scene (iii). 69)

EXPANDING THE ROLE OF COMMUNITY SERVICE IN IRELAND

INTRODUCTION

Unlike the community service order in England and Wales which in 1991 (Criminal Justice Act, 1991) was designated a "community sentence" thereby changing somewhat its status as an alternative to custody, the community service order in Ireland remained unchanged until the sanction was modified pursuant to Section 115 of the Children Act 2001. This allowed the partial use of the sanction of community service in respect of a limited cohort of offenders who might be given community service without the requirement that a custodial sentence would otherwise have to be imposed. Thus, a partial decoupling from the custodial requirement of the sanction was to be permitted under this legislative change. This modification of the sanction is considered in a separate chapter hereunder where it will be argued that a discrete sanction intended by the Oireachtas for use in respect of 16 and 17 year old offenders may be not capable of operation at all.

In chapter 3, the community service order as a distinct penalty in Irish sentencing policy and practice is seen to emerge. This is structured upon the central tenet that community service could only be imposed as a direct substitution for an immediately contemplated custodial sentence (Section 2, Criminal Justice (Community Service) Act, 1983). The intended policy to limit the use of community service orders as direct substitutes for custodial penalties was maintained throughout the Oireachtas debates by the Minister for Justice, Mr Noonan, despite a number of amendments put in by the Opposition and indeed by Deputy Shatter. Since the coming into force of the 1983 Act this policy has been maintained without change. Various influential bodies and writers have advocated the decoupling of the sanction of community service from the requirement to otherwise impose a custodial penalty (Law Reform Commission 1996, Expert Group on the Probation Service 1999). O'Malley suggests:

> "there is no legal reason why a community service order should not operate as a "stand alone" provision in the same way as a fine. The Act of 1983 could usefully

be amended to delete the requirement for a prior finding in relation to imprisonment." (O'Malley 2006:481).

As noted community service orders were introduced into Ireland in the face of a burgeoning crisis of prison overcrowding. Any new penal measure which would add to the prison population, especially short sentences imposed by the District Court, specifically the target group for the new sanction, was to be steadfastly avoided. The Minister had the benefit of research done by Pease (1977) and Young (1979) in England and Wales which showed that courts in that jurisdiction sometimes used the penalty of community service in a manner where a convicted person would not always have received a custodial sentence. It must be emphasised however that it was not, strictly speaking, a requirement to have a custodial sentence in mind when contemplating a community service order in England and Wales, as the threshold for imposing a community service order there was for " an offence punishable with imprisonment" (Section 14, Criminal Justice Act 1972) rather than in direct substitution for a custodial penalty in the jurisdiction of the Irish Republic (Section 2, Criminal Justice (Community Service) Act, 1983). In other words the offence defined the threshold for community service in England and Wales whereas in Ireland the first choice of penalty by the court i.e. a custodial sentence, defined the threshold for the use of community service as a sanction.

In the years after the introduction of community service in Ireland, the prison over-crowding crisis grew even more acute. This same prison population comprised a large number of prisoners sentenced to short terms of imprisonment by the District Court who were required to be released under the shedding procedure to make way for newer committals from the courts and in particular the District Court (O'Mahony 1992:92).

The value for money study by the Comptroller and Auditor General (2002) on the Probation Service revealed for the first time the true cost of implementing a community service order. The report fully accounted for the costs of breach proceedings and the consequential prison costs which would be necessary to be expended on receiving prisoners sentenced to custody by the courts for breach of community service orders. This figure as previously noted was in line with international rates of compliance by offenders on community service orders at *circa* 81%. Therefore, one in five community service participants were breached and sentenced according to the Comptroller and

Auditor General's Report. It must be noted that this figure of non-compliance and subsequent imprisonment was based upon a system where community service could only be imposed instead of a custodial sentence (Section 2 and Section 3, Criminal Justice (Community Service) Act, 1983). If the Courts were permitted to impose community service in substitution for other non custodial dispositions such as fines or probation, it is probable that such a widening of the cohort of offenders on community service would ultimately lead to an increase in the number of persons committed to prison. This argument is based upon the breach rate for community service remaining either constant at 1 in 5 or even increasing. As noted in chapter 3, the Judges were exercised to ensure that any order of the Court would be obeyed. It is likely, in these circumstances, that the courts would use community service in substitution for other alternatives to custody, thereby reaching down the sentencing ladder from custody and pulling the convicted person up closer to the top rungs, whereby custody becomes a more likely sanction upon breach (Sparks 1971, Cohen 1985).

In light of the decarcerative policy underpinning the introduction of community service in Ireland, this chapter sets out to examine the radical departure from the earlier approach, which departure was heralded by the passing of the Children Act, 2001, an Act introduced to divert children from custodial sanctions. A close textual analysis of this legislation, combined with a comparative analysis of the Criminal Justice (Community Service) Act, 1983 and the Criminal Justice Act 1972 in England and Wales provide the field of enquiry for this chapter. The emergent community service order transposed to the area of community sanctions will be explored to measure any detectable divergence from the community service order provided for in the original legislation.

COMMUNITY SERVICE IN IRELAND THE FIRST POLICY CHANGE

The policy to maintain quasi-parity between custody and community service in Irish penal policy and practice remained unchanged until a partial breach was introduced under Section 115 of the Children Act 2001. This permitted the use of community service designated under Section 115 as a "community sanction" to be made as a stand alone penalty for offenders aged 16 and 17 years. A child is defined under the Act as "a person under the age of eighteen years" (Section 3, Children Act 2001). Section 3 of the 1983 Act

allows a community service order to be imposed upon a person aged sixteen years and over.

The new community sanctions provided for under Section 115 have been described by Shannon as tangible expression of the principle "that detention is to be an option of last resort, to be ordered only in respect of serious offences of violence or the repeated commission of other serious offences" (2005:143). According to Walsh (2005) the community service order under Section 115 remains tied to the prescriptive requirement that the court must firstly be inclined to impose a sentence of detention whether in St. Patrick's Institution, a children detention centre or a children detention school before it may consider the use of a community service order.[54] Walsh specifically identifies the community service order within the list of community sanctions as an alternative to a custodial sentence. The availability of all the other community sanctions is not he states: "…confined to cases where the court would otherwise be inclined to impose a sentence of detention (or imprisonment) (Walsh 2005:207). He argues that the amendment of Section 2 of the 1983 Act provides a significant expansion of the application of community service to children committed to either a children detention centre (Section 147(b)) or a children detention school (Section 147(a)). A child committed to a children detention school is usually below the age of 16 years. However a children detention school may include a person over 16 years as a result of a continuing order of detention which commenced before the child attained the age of 16 years. In all other respects however Section 2 of the 1983 Act provides that the offender must be over 16 years of age before a community service order may be imposed. Thus the apparent expansion of the scope of community service in respect of children in children detention schools or children detention centres may be more imaginary than real, albeit the place to which the child may be committed is other than St. Patrick's Institution.

In discussing the position of community service orders in the scheme of sentences provided for under Sections 115-116 of the Children Act 2001, it is important to reflect on the possibility that the introduction of community service orders as a "community sanction" and the intended use of this specific sanction by the courts may not prove possible having regard to the manner in which the penal measure is structured within the

54 Section 2 of the 1983 Act is modified only to the extent that it includes for consideration for community service children who might be committed to a children detention centre or a children detention school in addition to St. Patrick's Institution. Section 154 of the Children Act 2001 provides: "Section 2 of the Act of 1983 is hereby amended by the insertion of the following after "St. Patrick's Institution" – "in any children detention centre designated under Section 150 of the Children Act 2001 or in a children detention school".

legislation.[55] However, for the purposes of analysis, this chapter proceeds on the premise that a distinctly new form of community service order has been provided for in this legislation and that orders of community service may be made in respect of sixteen and seventeen year olds (children) where the court would otherwise not be bound to contemplate a custodial sanction as the first choice of penalty before substituting such penalty with a community service order.

Clearly, the Children Act 2001 indicates a radical departure from the settled policy of using community service orders in a restricted manner while coupled to custodial sentences. It is important to emphasise that the settled policy since 1983 has not been altered in respect of adults or persons over eighteen years of age. The reply by the Minister for Justice to Deputy Stanton that he does not envisage any change in the policy confirms a continuance of such an approach into the future (supra). But evidently, and this is clear from speaker after speaker in the Oireachtas debates on the Children Bill 1999, the inclusion of community service as one of the ten "community sanctions", which by any measure would be characterised as middle range or intermediate penalties, severed the custodial requirement in making a community service order for sixteen or seventeen year old children and in that respect created a wholly new penal sanction. It will be recalled that a primary rationale for the introduction of community service orders in 1983 was to relieve the prison system of "unnecessary" committals for short term sentences, a large cohort of the overall prison population. It is somewhat difficult to reconcile this rationale with the new measure created under Sections 115-116 of the Children Act 2001, except to assume that the legislators were of the view that community service was under-utilised in respect of sixteen and seventeen year olds to date. The inclusion of community service orders in the new category of community sanctions presumably would promote their further use thereby lessening the need to make detention orders in respect of these specific offenders. It is argued in this chapter that the new statutory arrangement providing for the making of community service orders for children is unlikely to achieve this objective and may instead have the unintended consequence of increasing the number of sixteen and seventeen year old children in detention notwithstanding the legislative intent to use detention only as the penalty of last resort (Section 96 Children Act 2001, Whitaker 1985). It is possible, as a result of the major prison-building programme conducted by the Department of Justice in the late 1990s and despite the continuous growth in the prison population since 1983, the

55 A community service order may only be permitted under Section 2 of the 1983 Act provided the Court has first decided to impose an actual custodial sentence.

year community service was introduced, that the emphasis on prison overcrowding as a rationale for the continued use of community service orders in 2001 has diminished. Although the ratio of prisoners to a cell has not been reduced and continues at unacceptable levels, the practice of shedding large groups of prisoners to make way for newer committals from the courts had abated in 2001.[56] The issue of prison overcrowding may be seen in a new light when the use of community service is no longer tied to any custodial requirement. Prison overcrowding, as previously noted, provided a strong impetus for the introduction of community service in Ireland. Overcrowding in places of detention for juveniles remains acute to this day. One detects therefore a departure from the crisis management approach to prison overcrowding as a reason for the introduction of this new style of community service order in the Children Act 2001. Instead of simply substituting custody with community service orders for adult offenders, the courts may now use community service orders for sixteen and seventeen year olds as a generalised penalty.

It is argued in this study that the introduction of the sanction of community service under Sections 115-116 of the Children Act 2001 as a community sanction which does not require a prior custodial penalty presents major issues of interpretation which may eventually render the inclusion of community service orders as a "community sanction" inoperable. The main piece of legislation governing child welfare and juvenile justice for the preceding century, the Children Act 1908, could be regarded as a progressive piece of legislation for its time. However the new perspective underpinning the Children Act 2001 imports a wholly new welfare paradigm undeveloped in the Edwardian era.

Before discussing the location of community service orders in the scheme of community sanctions (Section 115) it is necessary to discuss the policy objectives behind the legislation, introduced in an era, where internationally, penal welfarism was seen to be in positive decline if not abandonment in respect of adult offenders. At a surface level, the Children Act, 2001 evinces a policy of benign intervention and rehabilitation and this is certainly identifiable in the speeches both of the Minister for Justice, Mr O'Donoghue and the Minister of State for Children at the Department of Justice, Ms Hannafin in their contributions to the Bill during its passage through the Dail and Senate. In particular the

56 However, in December 2008 adult prison capacity was at 114% with an extra 10% on temporary release. Capacity was equated with sleeping accommodation within the prison including sleeping on mattresses. (Department of Justice Equality and Law Reform – personal communication 10th December 2008).

Minister for Justice stated when dealing with the range of sanctions which a court could impose when sentencing a child offender:

> "these sanctions are of the utmost importance in that they give tangible effect to the principle in the Bill that detention will be an option of absolute last resort." (Mr. O'Donoghue, Minister for Justice, vol. 517, col. 37, Children Bill 1999 Second Stage, 29th March, 2000.

And later he reiterated:

"One of the purposes of the Bill is to provide the courts with an intervention and penalty structure suited to children. For example, the restorative conferencing provisions and community sanctions are designed specifically for children". (Mr O'Donoghue, Minister for Justice, vol. 538, col. 130, Dail Eireann Children Bill, 1999, 13th June 2001).

The legislation when passed specifically addressed the use of imprisonment as a penalty as follows:

Section 156. – No court shall pass a sentence of imprisonment on a child or commit a child to prison.

And further, applying the principle of parsimony, the Act sets out the principles relating to the exercise of criminal jurisdiction over children as follows:

Section 96. –

(1) Any court when dealing with children charged with offences shall have regard to-

(a) the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in parcicular, a right to be heard and to participate in any proceedings of the court that can affect them, and

(b) the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.

(2) Because it is desirable wherever possible-

(a) to allow the education, training or employment of children to proceed without interruption,

(b) to preserve and strengthen the relationship between children and their parents and other family members,

(c) to foster the ability of families to develop their own means of dealing with offending by their children, and

(d) to allow children reside in their own homes,

any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.

(3) A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless the penalty is fixed by law.

(4) The penalty imposed on a child for an offence should be not greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.

(5) Any measures for dealing with offending by children shall have due regard to the interests of any victims of their offending.

The courts on making a finding of guilt in respect of a child offender are empowered under section 98 as follows:

Section 98: - Where a court is satisfied of the guilt of a child charged with an offence it may, without prejudice to its general powers and in accordance with this part, reprimand the child or deal with the case by making one or more than one of the following orders:

(a) A conditional discharge order,

(b) An order that the child pay a fine or costs,

(c) An order that the parent or guardian be bound over,

(d) A compensation order,

(e) A parental supervision order,

(f) An order that the parent or guardian pay compensation,

(g) **An order imposing a community sanction,**

(h) An order (the making of which may be deferred pursuant to Section 144) that the child be detained in a children detention school or children detention centre, including an order under section 155(1),

(i) A detention and supervision order.

Having regard to the prohibition upon imprisonment of a child (section 156) the most restrictive penalty available to a court exercising criminal jurisdiction over a child is a detention order (section 142). However the court is again enjoined from using the penalty of detention except in the most parsimonious fashion under section 143 which provides: Section 143:-

1) The court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child and, in the case of a child under 16 years of age, that a place in a children detention school is available for him or her.
2) Where an order is made under Subsection (1), the court making the order shall give its reasons for doing so in open court.

The possibility of a child, for the purposes of this discussion, a sixteen or seventeen year old, receiving more than one penalty pursuant to section 98 could potentially expose him or her, if convicted, to a greater degree of punitiveness than would be possible in respect of adult offenders under Section 3 of the Criminal Justice (Community Service) Act, 1983.

Section 98 allows the court to make "one **or more** of the following orders" (emphasis added) which menu of orders could allow a combination of a fine and a community service order or even a community service order and detention; whereas Section 3 of the 1983 Act contains specific words of limitation by the use of the phrase "instead of dealing with him in any other way". This phrase excludes the possibility of a court making an order of community service which is coupled with any other sanction such as fine, a probation order or a term of imprisonment. It is argued therefore that, section 98 of the Children Act, 2001 provides the possibility of a more punitive approach to sixteen and seventeen year olds where a community service order may be made in combination with another penalty and this possibility is evidence of the emergence of a distinct penalty of community service in respect of sixteen or seventeen year olds which is different in character from a community service order as originally provided for under section 2 and 3 of the 1983 Act for adult offenders and indeed in respect of sixteen and seventeen year olds under the earlier legislation.

For the purpose of this discussion however, it is necessary to refocus upon the penalties of community sanctions and detention to fully understand the attempted metamorphosis of the penalty of community service which had operated in Ireland up to the passing and implementation of the Children Act 2001.

THE JUVENILE COMMUNITY SERVICE ORDER EMERGES

The attempted change in the character of community service orders is discernible throughout the Children Act 2001. When dealing with the penalty of fines, the legislation specifically prohibits the use of detention in default of payment of the fine penalty (section 110), an innovation which is likely to lead to the decline in the use of such sanction as sentencers lose confidence in the possibility of collecting such fines. (Comptroller and Auditor General 2000, No. 37)

Section 110 provides:

1) Where a court orders a child to pay a fine, costs or compensation and the child is in default-
    (a) the court shall not order that the child be detained in any case where, if the child were a person of full age and capacity, he or she would be liable to be committed to prison, and
    (b) in lieu of such an order, the court may make one or more than one of the following orders:
        (i) in the case of a fine, an order reducing its amount,
        (ii) an order allowing time, or further time, for payment of a fine, costs or compensation,
        (iii) an order imposing a community sanction appropriate to the age of the child.

Accordingly, community service orders can now be made where there is a finding that a sixteen or seventeen year old is in default in payment of a fine. It could be argued that the sanction for non-payment of fines by adults is a custodial sentence and accordingly the use of a community service order in lieu of a fine or as a penalty for the non-payment of a fine meets the policy objectives of using community service orders only where custody is in immediate contemplation by the sentencer. Section 110 imposes an obligation upon the prosecution to bring separate breach proceedings for non-payment of the fine in addition to the original criminal proceedings relating to the issue of guilt and the initial sentence. Accordingly, this necessitates entirely new proceedings for non-payment of the fine by child offenders sentenced to such penalty, a procedure which does not exist and is not necessary for fine penalties for adult offenders, as the fine penalty for adults contains within the order itself a period for payment and the specified period of imprisonment in default of payment of such fine. For example, a fine for careless driving under Section 52 of the Road Traffic Act 1961 might read in respect of an adult offender: "a fine of two hundred and fifty euros, ninety days to pay, fifteen days imprisonment in default". However section 110 which deals with default in payment of a fine, costs or compensation requires an entirely new proceeding in addition to the criminal trial or plea of guilty which preceded the making of the fine penalty in respect of the child offender, (Shannon 2005:414). The necessity to bring such proceedings in cases of default of payment of fines practically guarantees that fines will not be collected having regard to the experience in relation to the collection of fines generally for adult offenders where no extra proceedings are required and where the attrition rate in respect of the collection of such fines is extremely high and known to be so, by sentencers (Comptroller and Auditor General 2000, Report No. 37:34). However, it is now possible for a court to impose a community service order on finding a sixteen or seventeen year old in default in payment of a fine, which was not allowable under the 1983 Act. It could on the one hand be argued that the imposition of a community service order for the non-payment of a fine is less stringent or punitive than incarceration. However, the minimum period of hours under a community service order is 40 hours (Section 3(2) Criminal Justice (Community Service) Act, 1983). If one applies the principle of equivalence with two hundred and forty hours (maximum)

equating with twelve months imprisonment (maximum penalty on summary conviction of indictable offence), forty hours equates with two months imprisonment or sixty days. The default period of imprisonment for adults on non-payment of a fine rarely extends beyond the period of forty-five days imprisonment.[57] In fact, for the normal run-of-the-mill offences which attract fines such as public order offences and assaults, fine default periods are usually fifteen days imprisonment.[58] Accordingly the use of even the minimum period of community service for fine default by a sixteen or seventeen year old extends the potential level of punitiveness in respect of those offenders than would be the case for adult offenders. Moreover, the possibility of using community service orders in respect of sixteen/seventeen year old fine defaulters may clash with the literal and purposive construction of Section 2 of the Criminal Justice (Community Service) Act, 1983 which provides:

Section 2.- This Act applies to a person (in this Act referred to as an "offender") who is of or over the age of 16 years and is convicted of an offence for which , in the opinion of the court, the appropriate sentence would but for this Act be one of penal servitude, of imprisonment or of detention in St. Patrick's Institution, but does not apply where any such sentence is fixed by law.

For ease of reference, section 3 of the same Act should be read together with section 2. This provides:

Section 3.-

1) Subject to *section 4*, the court by or before which an offender is convicted may, instead of dealing with him in any other way, make, in respect of the offence of which he is convicted, an order (in this Act referred to as a "community service order") under this section.
2) A community service order shall require the offender to perform, in accordance with this Act, unpaid work for such number of hours as are specified in the order and are not less than 40 and not more than 240.
3) Nothing in this section shall be construed as preventing a court which makes a community service order from making, in relation to the offence in respect of which the order is made, an order under any other enactment for-

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57 Ord.23 Rule7 Of the District Court Rules 1997 (S.I.93/1997) provides:

Where a penalty has been imposed against a person such person shall in default of payment within the time specified (if any) be imprisoned for a term not exceeding the appropriate period specified in the following scale:

	Penalty	
1.	Not exceeding £50	- 5 days imprisonment
2.	Exceeding £50 but not exceeding £250	-15 days imprisonment
3.	Exceeding £250 but not exceeding £500	- 45 days imprisonment
4.	Exceeding £500	-90 days imprisonment

58 The vast majority of fines in the District Court are under €300 (Ryan and Riordan 2004)

(a) the revocation of any licence,

(b) the imposition of any disqualification or endorsement,

(c) the forfeiture, confiscation, seizure, restitution or disposal of any property, or

(d) the payment of compensation, costs or expenses.

For further ease of reference it is appropriate that section 115 is set out in full at this point to elucidate the position of community service orders as a community sanction. Section 115 of the Children Act, 2001 provides:

Section 115.- In this part, "Community sanction" means any of the orders referred to in *paragraphs (a) to (j)* which may be made by a court on being satisfied that a child is guilty of an offence-

(a) in the case of a child of 16 or 17 years of age, a community service order under section 3 of the Act of 1983,

(b) an order under *section 118* (a day centre order),

(c) an order under *section 2* of the Act of 1907 (a probation order),

(d) an order under *section 124* (a probation (training or activities) order),

(e) an order under *section 125* (a probation (intensive supervision) order),

(f) an order under *section 126* (a probation (residential supervision) order),

(g) an order under *section 129* (a suitable person (care and supervision) order),

(h) an order under *section 131* (a mentor (family support)order),

(i) an order under *section 133* (a restriction on movement order), or

(j) an order under *section 137* (a dual order).

The use of a community service order for fine default under section 110(1)(b)(iii), although in one sense substituting community service for a period of detention, which is prohibited under the Act in respect of the non-payment of fines (section 110(1)(a)), may now allow a court to impose a community service order without ever having contemplated a custodial sanction pursuant to section 2 of the 1983 Act.

But perhaps the most striking policy departure is contained in section 115 which empowers a court, exercising criminal jurisdiction over children, to impose a community sanction including a community service order, in respect of sixteen or seventeen year olds without reference to any restriction contained in section 2 of the 1983 Act. As we shall see, the primary rationale for introducing community service orders in 1983 has been dethroned, as it applies to sixteen and seventeen year olds. No longer is the use of community service orders for sixteen and seventeen year olds to be contemplated as a decarcerative penalty but, as in many other jurisdictions and in particular in England and Wales, community service orders can now seemingly be imposed as penalties for offences which would otherwise attract only a fine or probation.

NEW DEPARTURE

But how has this change in policy come about, especially as there has been no material amendment or repeal of the Criminal Justice (Community Service) Act 1983? It would appear that those drafting the legislation and legislators were minded to allow a limited de-coupling of the requirement that a community service order could only be made where but for the provisions of section 2 of the 1983 Act a custodial sentence would otherwise have been imposed. Section 115(a) refers to section 3 of the 1983 Act which if read singularly would appear to allow the making of a community service order as if the court is invested with unrestricted and wide discretion by the use of the phrase "…instead of dealing with him in any other way, …". However, section 2 of the 1983 Act is not repealed by the Children Act 2001.[59] Accordingly the overarching requirement of section 2 of the 1983 Act that a community service order can only be made in direct substitution for an immediately contemplated custodial sentence has not been displaced. This latter requirement might be considered the sheet anchor of the decarcerative policy established in the 1983 legislation. Unless section 2 of the 1983 Act is expressly amended to alter such policy or to allow an exception thereto in respect of 16 and 17 year old children, the policy is deemed to continue in full force and effect. As previously stated the use of the phrase "… instead of dealing with him in any other way, …" in section 3 of the 1983 Act, if anything, has the meaning of words of limitation when read in conjunction with section 2 of the 1983 Act, whereby a sentencing court may impose a community service order in substitution for an immediate custodial penalty but may not impose any other concomitant penalty such as probation or a fine in conjunction with the community service order for the one offence.

However, it would appear that section 115 of the Children Act 2001 seeks to put an expansive interpretation on section 3 of the Act of 1983 which would empower the court to make community sanctions, including community service orders without the restriction imposed by section 2 of the 1983 Act. It is argued in this study, that the use of the phrase "… instead of dealing with him in any other way, …" in section 3 of the 1983 Act was mere *surplusage* and in no respect altered the requirements of section 2 of the 1983 Act except to limit the accretion of additional penalties such as fines or probation in respect of the one penalty.

So where did the phrase come from and why was it used at all in section 3? To fully explore this issue, it is necessary to analyse the text of the 1983 Act and section 15 of the English Criminal Justice Act, 1972. If one examines the original legislation in England and Wales, one finds the same phrase in section 15 of the Criminal Justice Act 1972. Section 15 of that Act provides:

Section 15.-

1) Where a person who has attained the age of seventeen is convicted of an offence punishable with imprisonment the court by or before which he is convicted may, **instead of dealing with him in any other way** (but subject to subsection (2) of this section), make an order (in this Act referred to as "a community service order") requiring him to perform unpaid work in

59 Section 154 Children Act 2001 amends Section 2 of the Children Act to allow community service to be given in respect of children detained in a Children Detention Centre or a Children Detention School.

accordance with the subsequent provisions of this Act for such number of hours (being in the aggregate not less than forty nor more than two hundred and forty) as may be specified in the order. (my emphasis added).

However, the phrase "… instead of dealing with him in any other way,…" has a clear coherence within section 15 of the English legislation, because it genuinely refers to the real discretion contained in section 15 for sentencers in England and Wales, to impose a community service order for an offence subject only to the proviso that the offence is "… punishable with imprisonment …" (section 15 Criminal Justice Act, 1972). There is no condition precedent that the sentencer must have an immediate custodial sentence in contemplation as is the case with suspended sentences in England and Wales (R –v- O'Keefe [1969] 2 Q.B.29). The sentencer in England and Wales may equally impose a fine if she/he is so minded when considering community service, notwithstanding that the offence is punishable with imprisonment.

The process of policy transference which led to the introduction of community service orders into Ireland in 1983 was subject to certain pitfalls which were not clearly contemplated or anticipated when drafting the Criminal Justice (Community Service) Bill, 1983. By setting out a clear policy of using community service only in substitution for custodial sentences, the Minister for Justice refused a series of amendments which would have allowed the courts to impose community service orders in cases where custody was not in contemplation. However, section 2 of the 1983 Act disallowed that possibility, but notwithstanding this policy position maintained by the Minister, section 3 of the 1983 Act imported a critical phrase from the seminal English legislation which was quite unnecessary to give the enabling section full effect. The inclusion of the phrase appears to have the undesirable result of allowing further penal legislation, such as the Children Act 2001, to be influenced by the inclusion of such phrase to the effect that courts are now empowered to impose community service orders on sixteen and seventeen year olds without the restrictive effect of section 2 of the 1983 Act. However, section 2 of the 1983 Act holds firm to its prescriptive and limiting role on the imposition of community service orders and any attempt to expand the use of community service orders as set out in sections 110, 115 and 116 of the Children Act 2001 without appropriate amendment of section 2 of the 1983 Act is fundamentally flawed. The inclusion of the phrase "… instead of dealing with him in any other way, …" in section 3 of the 1983 Act to some extent ran counter to and lacked fidelity to the policy set out in section 2 of that Act, but the inclusion of such phrase notwithstanding, could not damage the working of the 1983 Act because section 2 was so unambiguous and definitive. A literal reading of section 115(a) of the Children Act 2001 suggests that the court has unbridled discretion to impose a community service order on a sixteen or seventeen year old provided the offender is merely guilty of an offence and further provided that he/she gives his/her consent (section 116, SS 3). Such a reading of section 115(a) without reference to section 2 of the 1983 Act may lead one into serious error.

NEW CRITERIA FOR IMPOSITION OF COMMUNITY SANCTION INCLUDING A COMMUNITY SERVICE ORDER

Any attempt to understand the relocation of community service orders in the Children Act 2001 must commence with an analysis of the legislation as it passed through the legislative process in the Oireachtas. When speaking on the function of Community Sanctions in the scheme of penalties, Deputy Michael Ahern put it thus:

"The third objective is to deal with the children found guilty of offences through the imposition of a community sanction. The Minister has provided ten community sanctions, eight of which are new. This gives great scope to make decisions that will not criminalise young children". Deputy Michael Ahern T.D., vol. 517 col. 787, Children Bill 1999 Second Stage 5th April, 2000.

The resulting section 115 lists the community sanctions as set out above (a) to (j) with the previously established community sanctions of community service orders and probation orders listed at (a) and (c) respectively. The manner in which these older dispositions are set out in the legislation has some significance especially in relation to community service orders. According to the legislators section 115 has the function of providing eight newly identified community sanctions and reiterating the pre-existing "community sanctions" of community service orders and probation (Deputy Michael Ahern Dail Debates vol. 517, col. 787, Children Bill 1999, Second Stage).

The pre-existing community sanction of the probation order is listed at section 115(c) as an order under section 2 of the Act of 1907. This merely has the effect of marshalling the probation order in a list of community sanctions without amendment to the Act of 1907 and more importantly without changing, in any way, the character of a probation order merely by listing such sanction and categorising it under the title of community sanction under section 115. However, it is argued that the community service order – under section 3 of the 1983 Act did certainly undergo a significant change in character when it was included without qualification or distinction in the menu or list of community sanctions under section 115 of the Children Act 2001. It is argued here that because community service orders are listed without distinction in section 115, the canon of construction *iusdem generis* yields an interpretation which obliges one to regard community service orders as co-equal penalties with the other nine community sanctions, which includes probation orders.

If the intention of the legislature was to maintain community service orders as a discrete sanction subject to section 2 of the 1983 Act then community service orders would not have been included in a list of so-called "community sanctions" where they can be regarded as co-equal and of the same type.

Additionally, section 115 appears to allow a court to make any community sanction provided only the offender is guilty of an offence. This would seem to indicate that not only is the higher Irish standard as prescribed by section 2 of the 1983 Act abandoned, but the threshold set out in the original English legislation (Criminal Justice Act 1972, Section 15), is also demolished where at least the offence in respect of which the penalty was to be imposed had to be "an imprisonable offence". This raises the interesting question as to whether a seventeen year old convicted of intoxication under section 4 of the Criminal Justice (Public Order) Act 1994 (as amended by Sec.19 Intoxicating Liquor Act 2008) could be given a community service order where the offence as set out in the statute provides for a monetary penalty only. If this is correct then one can conclude that the penalty of community service for sixteen and seventeen year olds as a sanction has been completely demolished and rebuilt in a fashion which is quite unlike anything experienced to date and which could be described as potentially more punitive.

The role of incarceration was mentioned widely throughout the Oireachtas debates on the Children Bill 1999. The views of the Minister for Justice are already referred to earlier in

this chapter. The Minister of State at the Department of Justice with responsibility for children in supporting the Minister for Justice put the purpose of the Bill thus:

"the kernel of this user-friendly Bill is that it ensures that every other penalty will be contemplated before prison is considered" Ms Hannafin, Minister of State, vol. 167, col. 498, Children Bill 1999, 20th June, 2001, Second Stage).

And later in the Senate, a government senator in a sweeping statement put the question beyond doubt when she stated:

"the thrust of this Bill is that children should not be imprisoned until that is the only option left after all other community based measures have been tried and then only if they fail", Senator Ormond, vol. 167, col. 516, Children Bill 1999, 20th June, 2001, Senate Debate.

In the Lower House Deputy Maloney of the Opposition, while welcoming the Bill and the new range of community sanctions, positioned the penalty of incarceration as the ultimate default penalty when he said:

"I also recognise that any system dealing with young offenders must retain the ultimate sanction of incarceration, but the Bill clearly is based on the premise that this option should only be brought into play after a range of community based measures have been exhausted" Deputy Maloney Dail Debate, col. 134 Children Bill 1999, Second Stage, 5th April, 2000 vol. 517.

Support for the interpretation by Senator Ormond and Deputy Maloney may be found in the Bill passed by both houses of the Oireachtas and signed into law by the President. Section 116 provides:

Section 116. –

(1) Where a court-

(a) has considered a probation officer's report or any other report made pursuant to this Part,

(b) has heard the evidence of any person whose attendance it may have requested, including any person who made such a report, and

(c) has given the child's parent or guardian (or, if the child is married, his or her spouse), if present in court for the proceedings, or, if not so present, an adult relative of the child or other adult accompanying the child, an opportunity to give evidence, it may make an order imposing on the child a community sanction, if it considers that the imposition of such

a sanction would be the most suitable way of dealing with the case.

(2) Where the court intends to impose a community sanction it shall explain to the child in open court and in language appropriate to the level of understanding of the child-

(a) why a community sanction is being imposed,

(b) the terms of the sanction and any conditions to which it is being made subject,

(c) the expectation of the court that the child will be of good conduct while the community sanction is in force and the possible consequences for the child of his or her failure to comply with the sanction and any such conditions, and

(d) the expectation of the court that the child's parents or guardian, where appropriate, will help and encourage the child to comply with the sanction and any such conditions and not commit further offences.

(3) In any case where the court has explained to the child the matters referred to in *subsection (2)* and the child does not express his or her willingness to comply with the proposed community sanction and any conditions to which it is being made subject, the court may, instead of imposing such a sanction, deal with the case in any other manner in which it may be dealt with.

(4) Where the child fails to comply with a community sanction or any conditions to which it is subject or where for any reason a community sanction is revoked by the court, the court shall not make an order imposing a period of detention on the child unless it is satisfied that detention is the only suitable way of dealing with the child.

An analysis of the wording that "a court … may make … the community sanction (including a community service order) if it considers that the imposition of such a sanction would be the most suitable way of dealing with the case" appears to liberate community service orders in respect of sixteen and seventeen year olds from the restricting role of section 2 of the 1983 Act. If community service orders as set out in section 115 and 116 are to be interpreted as subject to the limitations of section 2 of the 1983 Act then one might have expected a clause, subsection or wording in the Children Act 2001, to indicate such limitation. In this regard, the speeches by the Minister for Justice, the Minister of State with responsibility for Children, Senator Ormond and Deputy Maloney were not qualified or later corrected in the Oireachtas Debates leading one to conclude that what was said in the Dail and Senate adequately explains the literal and purposive interpretation of the Children Act 2001 that community service for sixteen and seventeen year olds was henceforth to be interpreted as a penalty without reference to custody, except and only when the issue of compliance with such order was to be addressed by a court, but otherwise the role of custody in the determination of a community service order as a suitable penalty was not to apply.

The restriction upon the use of detention for failure to comply with a community sanction, (section 116(4)), which must include a community service order under section 115, is further evidence of the legislative intent that a community service order could be made in respect of sixteen/seventeen year olds without a court first concluding that but for the Act of 1983 the penalty would have been a custodial sentence. McIvor's reference to "tortured logic" which requires a court to contemplate a custodial sentence before deciding upon a community service, becomes excruciating when one applies the strictures of section 2 of the 1983 Act to subsection 4 of section 116 of the Children Act, 2001. Quite simply, logic however tortured, fails in this exercise, yielding one clear interpretation that community service orders under sections 115 and 116 of the Children Act 2001 must henceforth be regarded *sui generis*, a distinct penalty from that which applies to adult offenders. It is argued that the legislators intended this result but the manner by which they sought to bring this about remains open to question.

These two positions are neither similar nor compatible. Perhaps this policy impasse of simultaneously structuring and de-structuring the prison system is best captured in a

speech by one member when speaking at the conclusion of the debate on the Children Bill 1999 when he stated:

"I was afraid the debate might be very legalistic or academic. However that has not been the case …" Deputy Haughey vol. 517 col.136 Children Bill 1999, Second Stage resumed 29th March 2000.

Instead, unlike the challenging policy amendments which were a feature of the Criminal Justice (Community Service) Bill, 1983 from Senators and T.D.s alike, the legislators of 2000 seem to have fixed upon the comforting and sometimes meaningless mantra of "community" without reference to the critical relationship that community service orders had in relation to the role of decarceration in the 1983 statutory arrangement. As a result, despite the general interventionist and rehabilitative thrust of the scheme provided for in the Children Act 2001 to divert children from custody, particularly in relation to the prohibition in the use of detention for children and even when allowable, only in the most restrictive manner, the transformation of community service under the same legislation if used widely and without the restrictive effect of section 2 of the 1983 Act could potentially operate in such a way as to increase the number of children committed into the custodial system. If the community service order is freed from the prior custodial considerations and may henceforth be applied in respect of sixteen and seventeen year olds for offences which might at present attract a small fine, then the potential for its wider use by judges of the District Court, which court exercises almost exclusive criminal jurisdiction in respect of children, must be considered a distinct possibility. This potential expansion of the use of community service orders has been analysed earlier in the responses of the Judges in the survey.

If one assumes an increase in the use by the District Court of community service orders in respect of children under this new statutory arrangement, what can one expect to happen within the custodial sphere? There is no doubt that the Children Act, 2001 is permeated by a policy which at an immediate level is de-carcerative and seeks to intervene in nascent criminal behaviours in children at an early stage. The use of family conferencing at the pre-trial stages (section 7 Children Act 2001) and garda diversion programmes (Part 4 Children Act 2001) represents clearly a positive indication of such an approach. However, the wider application of the community service order, as a community sanction for sixteen

and seventeen year olds will undoubtedly cause an increase in the number of such offenders committed ultimately to detention if the compliance rate for community service orders at eighty-one per cent (Comptroller and Auditor General 2004) is to hold for that cohort of offenders. The greater the number of offenders who are sentenced within this cohort to community service orders then the greater the number of breached offenders will be committed for non-compliance with the same community service orders, whatever the formal basis upon which a court may initially make a community service order whether in lieu of custody (section 2 and 3 of the 1983 Act) or as a stand alone penalty (section 115 and 116 Children Act 2001, section 15 Criminal Justice Act 1972 England and Wales). Ultimately, the court must have the power to impose a custodial sentence when an offender is brought before it on notice for non-compliance with the order (McIvor 1992 :185, Deputy Maloney supra).

THE PROBATION OFFICER FRIEND OR PENAL AGENT

The Probation Service might in the very near future face a significant challenge to their ethos when dealing with an increasing number of sixteen and seventeen year old offenders sentenced to community service orders who fail to comply with such penalties. Although the Children Act 2001 places extra responsibilities upon the field probation officer to render assistance and guidance to child offenders, the function of managing a greater number of juvenile offenders on community service schemes, a function not really extensive at present, (Walsh and Sexton 1999) will pose serious issues of professional orientation for the Irish Probation Service (Nellis 2004). As noted, the role of the probation officer historically has been to advise, assist and befriend the offender placed under his/her care under the Probation of Offenders Act 1907. However, since 1983 the management of offenders on community service schemes by the Probation Service has largely been the management of a punitive measure, permeated with certain discretionary practices by the probation officer, to ensure compliance with the order. Teenage offenders of sixteen and seventeen years of age have always presented as a distinct category of client for the Probation Service requiring a professional approach which is quite different to that applied to adult offender clients. The probation officer when dealing with teenagers must consider developmental aspects such as educational engagement, impulsiveness, alcohol and drug use, life experience, the perception of risk, and the use of money and leisure. These issues present quite differently when dealing with teenage

offenders as compared with adult offenders. These added features of professional consideration, which the probation officer must address when dealing with the juvenile offender, may well further complicate the negotiated relationship between the probation officer and offender sentenced to a community service order (Vass 1984). In particular the persistent problem which probation officers report in motivating a large number of offenders to complete their community service orders, to attend at the community service scheme with regularity and on time and comply with reasonable directions given by the community service organiser (Vass 1984, McIvor 1992, Eysenck 1986) must be expected to be more acute when dealing with a growing cohort of sixteen and seventeen year old teenagers sentenced to community service.

Moreover, if such schemes are mixed to include both adults and offenders aged between sixteen and seventeen, which is the case at present in Irish community service schemes, one could find a situation where an adult offender is working alongside a teenager offender where both are sentenced to community service, but the adult offender would be performing community service in lieu of a known term of imprisonment for a reasonably serious offence, while the seventeen year old might be serving community service for a relatively minor offence and without knowing what the alternative community penalty might be if he/she is in default. This scenario immediately imports an element of unfairness and inequity into the operation of community service orders which cannot easily be explained away by referring to the Children Act 2001 as a statutory scheme for dealing with criminal offending by children which seeks to divert such offenders from custody. The perception of this inherent inequity in treating adult and juvenile offenders differently under this sentencing regime will certainly not assist the probation officer in further motivating the juvenile client/offender to complete his/her community service order.

As already indicated, the primary function of community service is punitive (Young 1979) notwithstanding the rehabilitative aspects which may flow from the performance of a community service by an offender suitably matched to an appropriate scheme (Pease 1981:6). When rehabilitation emerges it must be considered a bonus (ibid). There is no obvious characteristic of the community service schemes which operate in Ireland, which would cause one to conclude that such schemes are not similarly punitive in their primary manifestation in this jurisdiction with some elements of reparation, rehabilitation and reintegration accruing to the benefit of some offenders on such schemes but certainly not in respect of all such offenders. One might argue that the separation of the scheme for

community service into two categories, where the imposition of community service for juvenile offenders might more easily be imposed, is another example of a bifurcatory policy of control over a certain sector of the population which is deemed to require more supervision while in the community (Cohen 1985) while extracting from them a greater element of punishment than that meted out to adult offenders.

COMMUNITY SERVICE FOR JUVENILES – AN EXERCISE IN NET-WIDENING

Sparks' useful image of the ladder to explain the ascending element of punitiveness in sentencing is worth recalling at this stage (Sparks 1971). His use of the analogy was primarily used to explain the dangers of placing an offender inappropriately on a suspended sentence where a more appropriate sentence of probation or even binding over might prove equally efficacious. An offender placed on a suspended sentence is one rung below the top rung of custody, whereas an offender placed on a probation bond or bound over can be located on the middle or lower rungs of a sentencing ladder. Because of the likelihood of further convictions of such an offender placed on a suspended sentence, especially for a relatively minor infraction of the law, such as a public order offence, the offender sentenced to a suspended sentence is more likely to enter the custodial system more rapidly than would be the case, if such an offender had initially been sentenced to an intermediate penalty such as probation.

A community service order under section 2 and 3 of the 1983 Act occupies a similar position on the sentencing ladder that Sparks identified for offenders sentenced to a suspended sentence in the English jurisdiction, that is, one rung below custody. Having regard to Spark`s schema of punitiveness and risk of incarceration, where precisely can one locate the sixteen/seventeen year old sentenced to a community service order on the sentencing ladder under section 116(4) and section 139[60] of the Children Act 2001?

Despite the opaque reasoning in these sections, the options open to a sentencing court on breach of a community service order are limited to two. Either the court will substitute

60 Section 139.- Where the court finds a child guilty of an offence, and the child is at that time subject to an order imposing a community sanction, the court may, in addition to or instead of any other powers available to it and subject to the provisions of this Part-

(a) revoke the order and make such other order imposing a community sanction on the child as the court thinks fit, or in addition to the order to which the child is already subject, make such other order as is mentioned in paragraph (a).

(b) in addition to the order to which the child is already subject, make such other order as is mentioned in paragraph (a).

the original community service order for another non-custodial penalty thereby substituting one alternative to a custodial penalty with another, which implies a certain circular approach, or the court may proceed to deal with the non-compliant offender by moving such offender up to the next step of penalty on the sentencing ladder which is the top rung of custody.

The position of the offender on the sentencing ladder according to this latter reasoning is somewhat fluid, ranging from one rung off the top at risk of incarceration upon breach, to somewhere in the middle rungs where an alternative penalty may be exchanged for yet another alternative thereby exposing the offender to a lesser risk of incarceration. It is hypothesised in this study that sentencers would be more inclined to place juvenile offenders on community service orders at the top rung but one of the sentencing ladder and would more frequently use detention, notwithstanding the provisions of section 116(4) and section 139 of the Children Act 2001, where such offenders are brought before the court upon breach, rather than the court contemplating a further alternative to detention. However this hypothesis must be subjected to empirical evaluation which presents a difficulty for the research, as the section is only recently operative. As observed in chapter 3, the general sentiment expressed by the Judges interviewed on the subject of breach of community service was to deal with it punitively by the imposition of a custodial sentence. One judge (A2J1DC) did speculate that breach of a community service order might not result in a committal to prison if the original community service was decoupled from the prior custodial requirement. Instead he speculated that a fine might be imposed. However, fines imposed on children are unlikely to be paid at all if there is no sanction to enforce payment. Thus the coercive power of the court to ensure compliance with its orders is seen to diminish in this scenario.

The maintenance of the dual policy of community service identified in this chapter in respect of adult and juvenile offenders may lead ultimately to an increase in the number of juveniles committed to detention as a result of breach proceedings for failure to comply with community service orders. However, this anticipated trend will depend in large measure on the determination of the Probation Service to apply reasonable standards for the management of community service orders on a nationwide basis, despite the absence of clear guidelines where non-compliance is unambiguously defined by reference to the frequency of absenteeism or minimum standards of behaviour and compliance on the part of offenders on such schemes. One could expect the strict interpretation of compliance

standards for sixteen/seventeen year olds sentenced to community service orders would lead to an unacceptably high rate of incarceration of such offenders in a short period of time. The challenge for the Irish Probation Service will be to manage such an expanding cohort of offenders under community service while simultaneously maintaining the confidence of the judiciary to sentence offenders to such schemes. This challenge may prove to be an unexpected legacy of this new policy.

CONCLUSION

In this chapter the emergence of a new form of community service order alongside the penalty established under the 1983 Act has been discussed in detail. This analysis has proceeded on the premise that a new class of community service order has emerged under section 115 and section 116 of the Children Act 2001, but cautions as to the possible separate operation of such order independently of section 2 of the 1983 Act which requires that community service can only be made in direct substitution for an immediately contemplated custodial sentence.

The inter-relationship between the Irish sanction of community service established under the 1983 Act and section 15 of the Criminal Justice 1972 in England and Wales has been explored to analyse the extent to which the latter legislation influenced the former. In particular, certain statutory phrasing which appeared to allow a wide discretion to the Irish sentencing court was transposed from the Criminal Justice Act 1972 in England into section 3 of the Irish Legislation. While section 2 of the 1983 Act puts speculation as to judicial discretion beyond doubt, the reference to section 3 of the 1983 Act in the establishment of the new form of community service order under section 115 of the Children Act 2001, without reference to section 2 of the 1983 Act, may have inadvertently sought to import such discretion.

Consequent upon the de-coupling of community service orders from any custodial requirement under section 115 and section 116 of the Children Act 2001 for sixteen and seventeen year olds, the chapter further analysed the possible wider use of community service for this group of convicted offenders. Certain inequities were identified between adult and juvenile offenders in the use of community service in this scenario which may

present difficulties for the Probation Service in enforcing community service on juvenile offenders when the level of punitiveness relative to adult offenders is perceived as unduly harsh. Additionally, the dangers of inducting such juvenile offenders into the custodial system through breach procedures for non-compliance may lead to the unintended result of increasing the number of juvenile offenders in custody which would not have been possible if section 115 and section 116 were not brought into force. While the general thrust of the Children Act 2001 clearly points to a decarcerative policy, the transformation of community service under the same legislation may provide a counter-productive force within the same policy structure which may increase the degree of incarceration.

The extent to which the Children Act 2001 may herald a new approach by sentencers to the use of community service orders must at this stage remain speculative since the section has been brought into force only recently and the possibility of a pattern of such usage by sentencers has yet to emerge for analysis. Moreover, one can but speculate on the extent to which this new sentencing departure may influence policy makers and legislators to yield to the promptings of influential bodies such as the Law Reform Commission (1996), the Expert Group on the Probation Service (1999), O'Malley (2000) and individual members of the judiciary to allow the making of community service orders as stand alone penalties without the requirement to decide upon a prior custodial sentence, before making a community service order. The implementation of section 115 and section 116 of the Children Act 2001 may provide an interesting pilot study on net-widening by comparing the operation of community service under the 1983 and the 2001 regimes respectively.

In chapter 3 the process of policy transfer in the area of criminal justice was discussed in detail to explain the influence upon the introduction of community service into Irish sentencing law. In particular, the over-arching influence of the former legislative centre for Ireland at Westminster from 1800 to 1922 was seen to have an enduring influence upon legislative measures in a number of areas not just limited to criminal justice issues (Fanning 1978, O'Mahony 2002:6). The experience of policy and legislative influence from a former colonial power is not unique to Ireland but has also been identified in other former colonies such as Canada and Australia. The process of constitutional disengagement from the former colonial power has never been so sudden and complete as to place a legislative function and duty upon the emergent state to design, as it were from a *tabula rasa*, new systems of economic and social organisation and criminal justice. Rather the process of

disengagement from the former colonial power has usually been attenuated to such a degree, that even after constitutional separation has occurred the policy and legislative processes in the nascent state continue to resemble more closely the same administrative and legal processes in the former imperial regime than one might have otherwise expected (Freiberg 2001, O'Mahony, 2002, Fanning, 1983).

In a famous speech by Mr De Valera in the 1940s on national self-sufficiency, he highlighted the need to fashion our national life according to "our native genius" without deferring to the mores and practices of foreigners. The issue of national pride impressed in Mr De Valera's speech to deal with social issues, including criminal justice issues, according to the standards of the local population, or as Deputy Kelly identified in the 1983 debate 'that of the people of Bangor Erris', may at one level be taken simply as rhetoric. However, at an administrative level when it came to single issues such as the introduction of community service orders in 1983, the adoption of the English scheme and legislative text was embraced with both arms by the policy makers, perhaps overly so, in light of the anomalies identified in this chapter.

Thus far, in Chapters 1-4 the community service order has received singular attention as a sanction designed to displace the custodial sentence and the extent to which it operates to perform such a function has been examined in detail. In the following Chapters 5-7, the suspended sentence is discretely examined as the other sanction which is used to displace the custodial sentence. The extent to which the suspended sentence may operate solely as a decarcerative measure will be central to the enquiry.

CHAPTER 5

THE SUSPENDED SENTENCE – A MECHANISM OF CONTROL OR AN ALTERNATIVE TO CUSTODY

"…It would seem difficult, if not ungracious, to regard the innovation as anything other than a stroke of genius." **W.N. Osborough** (1982:254)

INTRODUCTION

In the preceding four chapters the emergence of the community service order was outlined as a standard sentencing instrument in the disposal of criminal cases. While the deployment of community service in the Irish statutory arrangement can be characterised as a community-based sanction, it has been argued that the direct relationship between a custodial sentence and community service places the community service order in Ireland in the upper reaches of the scale of community sanctions. In this and the following chapters the second sentencing instrument associated with custody, namely the suspended sentence, will be examined.

Typically, the suspended sentence involves the imposition of a determinate sentence of imprisonment which the offender would be called upon to serve, if s/he is in breach of a number of conditions which may be recited in the order. The primary condition is that s/he does not re-offend within a prescribed period which is known as the operative period. On completion of the period of suspension or the operative period, if the convicted person has complied with his/her conditions, including if required his/her recognisance to keep the peace, s/he is discharged from all further liability under the penalty and is not liable for sentencing for any infractions outside of the operative period.

The suspended sentence in Ireland occupies an ambiguous space in the theory and practice of sentencing. The image of the chameleon might again be called into service when analysing the sentence. It will be demonstrated how the sanction has been used variously as an instrument to avoid the imposition of a custodial penalty, to engineer the future good behaviour of a convicted person and to secure restitution for damage or injury done. Sometimes all of these objectives are advanced at once and at other times only one specific objective is articulated in employing the sanction. However, in common with the community service order, the suspended sentence in Ireland is integrally connected to the

formal imposition of a custodial sentence notwithstanding any possible informal intent of the sentencing judge. Thus, the two sanctions occupy a unique relationship with the sentence of imprisonment.

As noted previously, the formal relationship between a custodial sentence and the community service order may not have been observed with consistency even in a jurisdiction which prohibits the use of community service unless a custodial sentence is specifically contemplated. While the making of a community service order is regulated by clear statutory provisions, the suspended sentence in Ireland emerged from less well defined parameters as a judge-made disposition in the early twentieth century. It will be shown how the development of the suspended sentence continued throughout the twentieth century in Irish sentencing and proved quite adaptable as a procedure in changing circumstances and times.

This chapter sets out to explore the emergence of the suspended sentence in Irish sentencing practice. As the disposition is historically a judge-made sanction in Ireland, it is useful to explore the sanction against the backdrop of the use of suspended sentences in other jurisdictions to understand more fully the unique characteristics of the penalty as it developed and is applied in this jurisdiction. By applying this method one may ask the following questions: What is the suspended sentence and does it have an internationally recognised character? What is the function of the sanction and how does it work? This approach enables one to enquire if the Irish suspended sentence differs from the suspended sentence in other jurisdictions in its rationale and function.

The chapter then proceeds to explore the possible rationales of the suspended sentence as it developed in Ireland with particular attention being paid to the possibility of identifying conflicting purposes for utilising the sanction.[61] It is argued here that the use of the suspended sentence in Ireland may be seen to promote conflicting rationales. At a formal level a custodial sentence is pronounced and is then avoided by the convicted person undertaking to abide by conditions of compliance for the duration of the operative period. At an informal level, the court may never intend the imposition of a real custodial sentence

61 Section 99 Criminal Justice Act 2006 gives a statutory expression to the avoidance of custody rationale for a suspended sentence, which came into effect on the 2nd October 2006 pursuant to S.I. 390/2006 This will be discussed separately in Chapter 7 as a discrete form of suspended sentence pursuant to statute.

but is utilising the formula of imposing such a sanction and then suspending it to secure the good behaviour of the convicted person. An analysis of the dynamic nature of the sanction as it developed over time may reveal a change in the purpose of the suspended sentence such as the development of the part-suspended sentence where the extraction of punishment may be seen to combine with elements of social control and a deterrence based approach.

Central to the enquiry is the role which the suspended sentence plays in the punishment if such is its purpose, or alternatively in the control of offenders. If the suspended sentence is a punishment the question may be asked is it punishment enough? Additionally, if the primary function of the suspended sentence is to control the future behaviour of the offender while under a suspended sentence, does it actually induce a level of control over the offender as a special deterrent?

It is argued here that a significant number of suspended sentences are made by the criminal courts in Ireland each year, only some of which are given as genuine substitutes for immediately contemplated custodial sentences. However, a large number of suspended sentences pronounced by the courts in Ireland may not have been made with immediate custody in mind and thus present as alternatives to other alternatives to custody such as fines and probation. If this latter view is accurate, the purpose and function of the sanction must be examined closely to assess the underlying rationales for its ubiquitous use.[62]

Finally the chapter concludes with a discussion on the relative position which the suspended sentence occupies in the overall scheme of sentencing. Is it, as many offenders regard it a "let off" (Ashworth 2002:1103) which demands no more than that expected of any citizen - to keep the peace? Alternatively is it as O'Malley (2006:457) suggests, a real

62 The frequency of use of the suspended sentence in the Republic of Ireland has been examined in a number of studies. In a study of the Galway District Court for the period 1978-1981 Needham (1983) on a 5% sample of all indictable offences disclosed that of those convicted, 11.2% were given sentences of imprisonment, 13.3% were given suspended sentences, 34.8% were fined while the remainder were either given the probation act, had their cases adjourned generally or were taken into consideration. In the special national survey for the District Court commissioned by the Whitaker Committee in 1984 (Rottman and Tormey 1985) however a different pattern of the use of the suspended sentence in the District Court is revealed where only 2% of those found guilty received a suspended sentence, while 20.4% received imprisonment and 46.9% received fines. This survey by Rottman and Tormey however should be distinguished from the Needham study which was limited to indictable offences only whereas Rottman and Tormey included all cases of offence including summary offences subject only to the proviso that the offence was also punishable by imprisonment. Rottman and Tormey did a further study for the Whitaker Committee in 1984 of disposals in the Dublin Circuit Criminal Court (Rottman Tormey 1985). Of those convicted in that court 49% received a custodial sentence while a further 38% received a suspended sentence with fines amounting to only 4.4% of all disposals.(Bacik2002:355-357).

punishment where a threat of activation of the sentence is the essential punitive element which endures alongside the stigma of receiving a custodial sentence, albeit suspended?

Throughout the chapter, the reader is alerted to the suggestion that the suspended sentence as operated in Ireland on a common law basis may seek to answer the demands of sentencing requirements, some of which are quite contradictory or at least conflicting. A true understanding of the suspended sentence in Ireland, it is argued, can only be gleaned from the theoretical exposition contained in this chapter combined with an overview of the actual use of the sanction by the criminal courts in Ireland which will be discussed in Chapter 6 which deals with the operationalisation of the sanction.

THE SUSPENDED SENTENCE : AN IRISH INNOVATION?

A Judicially Developed Sanction

The general characteristics of the suspended sentence have been outlined in the introduction to this chapter where a sentence of imprisonment is given or recorded and is thereupon immediately suspended on condition that the offender undertakes to keep the peace for a specified period and will come up for sentencing if called upon to do so if s/he is in breach of such undertaking. Usually the undertaking given by the offender is formalised by the offender entering into a bond to keep the peace secured by a principal surety of the offender him/herself but may also be subject to secondary independent sureties. In this section the evolution of the suspended sentence in Ireland will be examined, as this appears to be the first criminal jurisdiction in which the use of the suspended sentence can be identified.

The modern root of title to the suspended sentence in Irish law can be found in the case People (D.P.P.) –v - McIllhagga (Supreme Court, 29th July 1971(unreported) where O'Dalaigh C.J. proclaimed that the suspended sentence had long been recognised as "a valid and proper form of sentence" (Osborough 1982:222). In R.-v- Wightman [1950] N.I. 124 in a judgment of Lord Chief Justice Andrews, he proclaimed the inherent power of the criminal courts in Northern Ireland to record a sentence against a convicted prisoner and to bind him over on recognisance to attend for judgement on notice. In asserting such inherent power in the criminal court in Northern Ireland in 1950 the Lord Chief

Justice stated:

> "We are naturally much impressed by the long continued and uninterrupted practice of so many Irish judges who, prior to 1921, exercised jurisdiction over the whole of Ireland, and who since that date have exercised two distinct jurisdictions in Northern Ireland and Eire respectively. While it is impossible for us in Northern Ireland to trace back the origin in the statute law, or to ascertain such origin in records which we do not possess, and whilst we are accordingly unable to assign to it an immemorial character, yet is the practice certain in itself and salutary in its operation". (p.128)

While earlier he stated:

> "It is further a matter of considerable importance that such recorded sentences have also frequently been imposed by circuit judges and other members of the judiciary in Eire, including the Court of Criminal Appeal; and no question has every been raised there as to the legality of the procedure, just as, until the present case the issue has never been raised in Northern Ireland". (p.128)

Osborough argues that if the practice of suspending sentences had its origins in the early 19th century, it is not credible for it to have remained so hidden from official discourses (Osborough 1982:227). However, he does acknowledge that the practice of imposing suspended sentences had been fashionable among certain Judges of the King's Bench in Ireland before 1920. A number of senior Judges and barristers from both sides of the border whose careers had started before 1920 attested to the regular use of the suspended sentence by W.H. Dodd, a Judge of the King's Bench in Dublin from 1907 to 1924 (Osborough 1982:226). Osborough's search for the elusive beginnings of the suspended sentence forced him to conclude that there are no printed references to the suspended sentence at all prior to the mid-1920s, but he locates an address by the Lord Chief Justice of Ireland, Sir Thomas Molony in 1927, which called for the introduction of the disposition in the jurisdiction of England and Wales (Molony1927).

Another source ascribed the commencement of the suspended sentence to Sir Thomas Lopdell O Shaughnessey K.C., Recorder of Dublin 1905-1924 but for the same period. The latter is credited with introducing the suspended sentence system at the Green Street

sessions (Hardiman 2004:5). By way of experimentation in the form of sentence, he devised "a probation system of his own" whereby "the prisoner is not asked to serve (his sentence) unless and until he breaks the law again" (Hardiman 2004:5). The tendency of Irish judges to experiment in the formulation of sentences continues to the present day. Sometimes, as was the case with the suspended sentence, these organic practices acquire the mantle of general acceptability and application as is evident from the judgement of Sir James Andrews above.

An earlier reference to a type of suspended sentence may be identified in the sentencing practice of Special Commissions to quell agrarian unrest by holding a sentence of death in abeyance pending "the future conduct of the peasantry" (Lefroy 1871:72). At the Cork Special Commission of 1822 Baron McClelland, having convicted 366 offenders, sentenced 35 to death. Of the remainder he "…announced that the death sentences would be suspended and that their several fates would depend on the "future conduct of the peasantry": "if tranquillity were restored, and the surrender of arms in the district became general, mercy would be extended to them; but if no sure signs of returning peace appeared, their doom was inevitable'" (Lefroy 1871:72).[63] This form of suspended sentence was predicated not necessarily upon the individual and voluntary actions of the convicted person but on the compliance of his neighbours and on his co-conspirators to keep the peace generally in the locality. One cannot recognise this judicial approach in modern sentencing law when comparing the current practice of suspended sentences. The use of the penalty as a generalised deterrent upon the population as a whole is incongruent with the modern use of the suspended sentence which seeks to deter specifically the convicted person from further criminal behaviour and nobody else.

Osborough's search for the origins of the suspended sentence forced him to conclude that a number of judges serving in the criminal courts in Ireland in the late nineteenth century "quietly and unobtrusively commenced to suspend prison sentences", justifying this course of action by referring to the inherent jurisdiction of the court and arguing, too, by analogy from the practice of "recording" death sentences.

However as the development of the suspended sentence, as it emerged, had no statutory basis and therefore found its roots within the common law or judge-made law, Osborough

63 Tom Lefroy inamoratus of Jane Austen (Hardiman 2004:16)

queries the absence of such a sentencing procedure within the jurisdiction of England and Wales at the same time. He makes a convincing argument to the effect that the suspended sentence may not have been universally part of the common law, otherwise the procedure would have been known widely in all common law jurisdictions, but concedes that the sanction enjoys "an impregnable position in modern Ireland" (Osborough 1982 :229). Interestingly in Morris and others –v- Crown Office [1970] 2 Q.B. 114 Denning M.R. when dealing with the issue of the power of the civil court to suspend a term of imprisonment for civil contempt, confirmed that such a power to suspend a sentence of imprisonment in effect exists at common law but more importantly went on to state:

> "I have often heard a judge say at common law, for ordinary offences, before these modern statutes were passed; 'I will bind you over to come up for judgement if called upon to do so. Mark you, if you do get into trouble again, you will then be sentenced for this offence. I will make a note that it deserves six months imprisonment. So that is what you may get if you do not accept this chance.' That is the common law way of giving a suspended sentence. It can be done also for contempt of court". Lord Denning M.R. (Morris – v – Crown Office, Court of Appeal [1970] 2 Q.B. 125).

This observation presents a challenge to the received wisdom that the suspended sentence in England and Wales did not pre date the statutory manifestation of the sanction introduced under the Criminal Justice Act, 1967. The very words of the sentence quoted above seem to answer the requirements for the suspended sentence initiated in Ireland in the late 19th and early 20th centuries. The accused is bound over, presumably for a definite period of time, and a sentence is recorded to be imposed if the accused is in breach and does not "accept this chance". However on closer examination the sentence which the Master of the Rolls had often heard pronounced at the conclusion of criminal trials in England and Wales appears no more than a conditional binding over to keep the peace because the actual sentence of imprisonment is not pronounced as such and then suspended. Instead the sentencing judge merely notes what is deserving if the accused is in breach of his/her bond, which is not quite the same thing as the suspended sentence in use in the Irish criminal courts on a common law basis.[64]

64 The practice of English sentencing judges to note what sentence is deserving before placing the accused on a bond to keep the peace may have developed from very pragmatic requirements to record what sentence might have been most appropriate while the facts and issues of the case were fresh in the mind of the sentencer. Thus the sentencer would be in a position to refer to the sentence which s/he was intending to impose before placing the accused upon his/her bond if the accused is called up for sentencing. The court is thus saved the difficulty of embarking upon a new hearing to "fix" the appropriate custodial sentence at a temporal remove when the facts and issues of the case may have receded in the sentencer's memory.

Thus the suspended sentence is seen to emerge as a judge-made practice in the disposal of criminal cases in the late nineteenth and early twentieth century in Ireland. It was not initiated by any enabling provision in an Act of Parliament but was based upon the recognition of an inherent power of the court to deal with the convicted person by imposing a sentence of custody and then conditionally suspending it for a fixed period of time.

Contemporary Use

The use of the suspended sentence is now an established sentencing practice at all criminal court levels in the Republic of Ireland. However, prior to 1920 according to Osborough no bench of magistrates made a suspended sentence. The power to suspend sentences appears to have been reserved only to courts which exercised jurisdiction to try cases on indictment. After independence, the magistrates in Northern Ireland refused to assume the power to suspend a sentence until 1968 following the enactment of the Treatment of Offenders Act, notwithstanding the decision in R.v. Wightman (supra) where it was declared a criminal court has an inherent power to record a sentence against a convicted person and to bind him over on a recognisance to attend for judgment on notice. However, the High Court and County Courts exercising criminal jurisdiction for the trial of indictable offences did continue the practice on a common law basis until overtaken by the 1968 legislation in that jurisdiction. Meanwhile in the Irish Free State, and the Republic of Ireland which followed, the District Justices in the newly established District Court commenced the use of the suspended sentence on a systematic basis as early as 1928 in the disposal of indictable offences tried summarily and indeed in respect of summary offences (1928, 62, Irish Law Times and Solicitors Journal 228). Specific reference was given to this inherent jurisdiction in the 1948 District Court Rules which prohibit the issuance of a warrant to activate a suspended sentence after six months from the date of the making of the order. (District Court Rules 1948, rule 68(2).[65]

Similarly, in the Circuit Criminal Court the general use of the disposition emerged quickly in the 1920s. Osborough cites a number of cases in the Irish Law Times and Solicitors

65 People (A.G.)-v-MacDonald [1929] 63, ILTR 80. People (A.G.)-v-Whelan [1934] I.R. 518.

Journal for the period which saw the introduction of the practice in that jurisdiction (Osborough 1982:228). Moreover, military courts in the 1920s in the Irish Free State utilised the suspension of custodial sentences, although the Attorney General of the time did express concerns about its use (Campbell 1994). The suspension of a sentence in Ireland relates solely to the suspension of a custodial sentence of penal servitude, imprisonment or detention, although legislation contemplated in 1967 (Criminal Justice Bill 1967 Section 50) sought to grant to the courts also the power to suspend the sentence of a fine in addition to that of imprisonment. While the Criminal Justice Bill 1967 failed in its passage through the Oireachtas,[66] it is instructive to the reader as one source of official thinking on the sanction and related matters which will be discussed later.[67]

A standard condition of any suspended sentence is that the offender does not re-offend and will keep the peace during the operative period. On this obligation O'Siochian (1977:27) writes that there is "a complete discharge" at the end of the specified period if the recognisance is kept. However, one must read O'Siochain's phrase "complete discharge" as having application to the penalty only. The phrase "complete discharge" should not be equated with either a conditional or unconditional discharge provided for under Section 1(1)(a) or (b) of the Probation of Offenders Act 1907 as the conviction is clearly recorded in the case of a suspended sentence and endures as a record of previous convictions while a discharge under Section 1(1) of the Probation of Offenders Act 1907 does not have the effect of recording a conviction. Put simply, if a person is given a suspended sentence and is not called up for sentence for breach of his/her recognisance to keep the peace and to abide by any conditions imposed, s/he is deemed to have "served the sentence" and would not be amenable to any further sanction in respect of the original offence.[68]

While the status of the suspended sentence (Whitaker 1985) may have obscure origins, the

66 The Criminal Justice Bill 1967 failed to be implemented into law due to the dissolution of the Dail in June 1969 when the Bill was last at committee stage on the 7th May, 1969. The provision which sought to place the suspended sentence on a statutory footing was contained in the Miscellaneous Provisions Section of the Bill

67 The new Irish statutory suspended sentence will be discussed fully in Chapter 7. For the present this chapter surveys the emergence of the suspended sentence as a common law disposition which endures alongside the new statutory power to suspend sentences.

68 O'Malley (2006) posits the suspended sentence as a real sentence not only for the stigma attached to the recipient of a custodial sentence but he also argues that the period of suspension is a punitive element to be served out by the convicted person. A conditional or unconditional discharge under Section 1(1) of the Probation of Offenders Act 1907 does not carry either the stigma of a custodial sentence nor the punitiveness of enduring the risk of custody during the period of suspension.

validity of the procedure as a sentencing measure has been confirmed in a series of cases. In *McIlhagga* (1971supra) , O'Dalaigh C.J. approved its traditional use as an Irish sentencing practice. More recently in O'Brien –v - Governor of Limerick Prison [1997] 2 ILRM 349 the Supreme Court per O'Flaherty J. stated:

> "… the development of the suspended sentence was an invention of the Irish judiciary … The use of a straight-forward suspended sentence is so well established in our legal system as not to require any elaboration here except to note that it is obviously a very beneficial jurisdiction for judges to possess". (Michael O'Brien – v – Governor of Limerick Prison [1997] 2 ILRM, O'Flaherty J. p.353)

In 1985 the Whitaker Committee expressed concerns about the status of the sanction. In particular they noted that the sanction lacked the legislative clarity which the 1967 Criminal Justice Bill would have conferred upon it. This legislative clarity was to finally emerge with the passing of the Criminal Justice Act 2006. Notwithstanding such lack of legislative clarity to underpin the status of the suspended sentence, the sanction has become one of the most commonly used[69] sentences by judges in Ireland during the past century.

Recent data published in the Annual Reports of the Courts Service disclose that in the Circuit Criminal Court in Dublin in 2005, 29% of all offenders had their cases disposed of by way of a wholly suspended sentence while in the rest of the State 32.5% of all offenders had their cases disposed of by way of a wholly suspended sentence in the same year (Courts Service Annual Report 2005 extrapolated). Meanwhile, in the District Court for the year 2006, 21,018 received custodial sentences of which 6,443 were fully suspended.[70] This represents a ratio of 3:1, in other words 30.65% of all custodial sentences were suspended in the District Court for that year.[71]

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69 The Needham (1983) study of Galway District Court discloses that in the period 1978-1983 13.3% of all indictable offences dealt with summarily in that court were disposed of by way of suspended sentence.

70 Suspended sentences in the District Court are masked under the heading of custodial sentences. In other words the Courts Service annual reports do not separately report a suspended sentence. These are counted as custodial sentences. It was therefore necessary for the writer to examine the original source material in the Courts Service to ascertain the number of suspended sentences granted in the District Court for the years 2005 and 2006.

71 The actual number of custodial sentences was 14,575. When the total number of summary cases (329,775) is added to the total number of indictable cases (48,272) for 2006, the percentage of custodial sentences imposed in the District Court for all cases prosecuted is 3.85%. The percentage of fully suspended sentences for all cases prosecuted or commenced is 1.7%. Comparable figures for 2005 show exactly the same pattern. Suspended sentences in 2005 in the District Court represented a ratio of 3:1 or 31.22%. For every custodial sentence imposed, one in three was suspended. Custodial sentences were imposed in 3.7% of all cases commenced while fully suspended sentences were imposed in 1.7% of all cases prosecuted (Courts Service – Raw data sets October 07 examined by writer and extrapolated).

In the Central Criminal Court for the year 2006, 17.64% of all non-mandatory sentences were concluded by way of a wholly suspended sentence. [72]

In Ireland the part-suspended sentence is a common sentencing option exercised by the Central and Circuit Criminal Courts but is hardly ever utilised in the District Court.[73]

The power of the courts to suspend sentences has finally been placed on a statutory footing about a century after the judges in the Irish criminal courts first commenced to use the disposal as an inherent power of their jurisdiction. Such practice was to spread very quickly upon the establishment of the Irish Free State to all levels of criminal jurisdiction for both indictable and summary offences. While the chronological origins of such jurisdiction may be somewhat obscured, the power of the Irish criminal courts to suspend sentences became unassailable well before the passing of the legislation which finally granted the courts the statutory power to do so. As a result the search for the rationale and function of the sanction must initially be located within judicial deliberations.

The Rationales underpinning the Suspended Sentence

This section sets out to explore the possible rationales for the suspended sentence as it developed within a judicial framework in Ireland. However, the development of the sanction in the jurisdiction of England and Wales is constantly referred to by all of the leading Irish writers as a comparator to explain the purpose and operational aspects of the sanction (O'Malley 2006, Walsh 2002, Whitaker 1985). This same method was also used by Andrews L.C.J. in R –v- Wightman [1950] N.I. 124, when the court of its own motion added an additional ground of appeal which questioned the very validity of the suspended sentence. That court proceeded to examine the historical validity of the suspended sentence by the Irish criminal courts before 1922 where Andrews L.C.J. stated:

> "… [t]here does not appear to be any reference in the English text books on criminal law and practice to recorded sentences such as that imposed upon the prisoner in the

72 Six cases in total of which 3 rapes, 1 sexual assault, 1 criminal damage and 1 manslaughter, which was later reactivated upon complaint (Registrar Central Criminal Court to Writer 11th Oct 2007).

73 In 2005, a 0.99% (or 58) of all District court custodial disposals had a part suspended element. In 2006, 2.15% (or 122) of all District Court custodial disposals had a part suspended element. (Court Service 1976-1977 cols. 655-656) internal data – examined by writer). In 2006 Dublin Circuit Criminal Court disposed of 925 convictions as follows: 333 fully custodial sentences, 369 fully suspended sentences and 223 partially suspended sentences. Thus 40% of custodial sentences were partially suspended in the Dublin Circuit Criminal Court for that year (Courts Service – Personal Communication 10th October 2007). In Cork Circuit Criminal Court for 2006, 39% of all custodial sentences excluding fully suspended sentences had a part suspended sentence element attached. (Cork Circuit Criminal Court – Case Books examined by writer October 2007).

present case". (R-v-Wightman, 1950 N.I. 124)

The search for the rationale for the suspended sentence in Irish sentencing practice tends to be as elusive as the search for its origins, and in some respects both are inextricably linked. While sentences which attract suspension are exclusively custodial (Osborough 1982) the judicially invented suspended sentence in use in Irish criminal courts finds its primary identity and expression as a device which seeks to control the future behaviour of a convicted person, in contrast to the suspended sentence in other jurisdictions which promote the suspended sentence as essentially the avoidance of custody (Weigend 2001:205, Freiberg 2001:47).

The emergence of the suspended sentence in continental Europe and Australia must be seen in the wider context of changes in sentencing practices within these jurisdictions and in particular the movement towards finding alternatives to custody and the emergence of community based sanctions.[74]

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74 Germany

Following a radical restructuring of policy in Germany in 1969 (Zweites Gesetz zur Reform des Strafrects of July 4, 1969), which sought to limit the use of imprisonment solely to cases where imprisonment became inevitable, the sanction formed a significant diversionary function from the previous custodial approach. The abolition of shorter sentences of less than one month combined with the mandatory requirement on judges to give written reasons for the imposition of short-term custodial sentences, was quickly reflected in a significant decline in the number of convicted persons in custody from 136,519 in 1968 one year before the reforms to 36,874 in 1996 (Weigend 2001:192). The suspension of sentence played a central role in this diversion from custody as judges were additionally required to justify in writing why, having contemplated a custodial penalty, the court should not then proceed to suspend the sentence in cases where the custodial sentence was less than one year. Overall, the German approach to bring down the level of punitiveness in sentencing discloses a shift from custodial to non custodial sanctions. Weigend (2001:196) characterises the German suspended sentence as something which approximates to probation in the Anglo-American system. The convicted person given a suspended sentence in Germany, may in addition to the types of conditions common to the Irish suspended sentence such as avoidance of contact with specified persons and the payment of specified compensation , be required to report to a probation officer for directions on rehabilitation (Para.5.6(d) P.C.). This hybrid, between the suspended sentence and probation is not readily recognisable in Irish sentencing practice, although a deferred or adjourned sentence pending supervision by a probation officer and subject to review by the court may approximately to the German model. The alternative penalty which might be given by an Irish criminal court would not be known in advance of the final disposal of the case unless the court was to conditionally indicate the likely penalty in the event of the convicted person not co-operating with the probation officer. Section 100 of the Criminal Justice Act 2006 does however introduce a deferred penalty where the penalty must be specified in advance.

Australia

In some Australian states the suspended sentence may be combined with supervision by a probation officer and even community service, although in the majority of states the suspended sentence is regarded as a stand alone penalty where no conditions can be made except standard conditions relating to good behaviour and a requirement that the convicted person does not re-offend (Freiberg 2001:47). Since 1985 the jurisdiction of Victoria has been the suspended sentence emerge as a dynamic sentencing tool where 35% of the sentences for serious offences in the superior criminal courts were suspended sentence of imprisonment (Freiberg and Ross 1999). There is some evidence within this sentencing change of displacement of the pre-existing sanctions of fines and probation and peace bonds (Freiberg and Ross 1999).

Initially the suspended sentence in the State of Victoria was limited to substitution for sentences of imprisonment under 12 months. Subsequently this was extended to a substitution for imprisonment of up to 24 months in 1991and to 36months in 1997 such was its popularity (Freiberg 2001:47). However, sentencing legislation is subject to the ebb and flow of public opinion. The tendency on the part of the superior criminal courts in Victoria to grant a suspension of sentence in almost one in four cases (24%) came into sharp focus in respect of a number of highly controversial cases there. In August 2006 a Bill was introduced in the State of Victoria to limit the powers of sentencing courts to impose wholly suspended sentences for a serious offence and to provide for better enforcement of breach of suspended sentences in general. Freiberg has criticised the use of the sanction as a displacement of the fine and probation with little effect upon the overall reduction of the prison population on the one hand, while allowing certain cases to be disposed of by suspension which in other respects should have attracted an actual custodial sentence (Freiberg 2006 The Law Report ABC Broadcast 25th July 2006). A certain retrenchment may be observed in the use of the suspended sentence in the State of Victoria. Initially the sanction was given wide use by the sentencing courts but came under scrutiny in the media and by the Sentencing Advisory Council. The sanction was severely criticised by the Sentencing Advisory Council as a displacement of other equally efficacious dispositions such as probation and community based sanctions. The suspended sentence equally challenged the public understanding that a custodial sentence would require the offender to enter custody and not to be a liberty to all. This Australian experience with a sanction may well follow the English trajectory of reform thus leading to its ultimate demise. The suspended sentence under Section 99 of the Criminal justice Act 2006 in Ireland allows Irish sentencers to use the sanction essentially without restriction upon conditions save that such

The advent and development of the suspended sentence in other jurisdictions, but particularly in the historically connected jurisdiction of England and Wales, is instructive when contemplating the Irish sanction for any number of reasons.

The suspended sentence introduced in England and Wales under the Criminal Justice Act 1967 initially failed to provide a statutory rationale for the sanction. In 1969 however the Court of Criminal Appeal held that sentencing courts must first consider and dismiss all non-custodial options such as fines and probation as inadequate to the sentencing task and then decide that a sentence of imprisonment had to be imposed, determine the period of imprisonment and then and only then consider whether the sentence of imprisonment could be suspended in the particular case (R-v- O'Keefe 1969 2.Q.B.29).

The Criminal Justice Act 1973 in England and Wales however did crystallise the principles set out in the case of R-v-O'Keefe [1969] 2Q.B.29, where under Section 11(3) the Statute provided:

> "an offender shall not be dealt with by means of a suspended sentence unless the case appears to the court to be one in which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence". (Criminal Justice Act 1973, Section 11(3))

Accordingly one can conclude that Parliament intended the use of the new power to suspend sentences to be exercised only where a term of imprisonment would otherwise have been imposed instead of using the suspended sentence as an alternative to any other alternative to custody. The rationale for the English suspended sentence after 1973 becomes clarified as a sanction to avoid the imposition of custody where custody would otherwise have been imposed.

Throughout the history of the suspended sentence in England and Wales the propensity of the judiciary to re-import deterrent principles was truncated by legislative changes ultimately leading to the near abandonment of the sanction by sentencers there. The fixed

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conditions must promote reduction of offending (Section 99(3)). In contrast with the experience of the jurisdiction of Victoria, Ireland seems to be embarking upon a course in the use of the suspended sentence which challenges the experience gained in the use of the sanction in Victoria. In particular the issues of penalty escalation, net widening in the use of the sanction and the relative utility of the sanction compared with other Irish disposals are as yet unchartered aspects of the sanction in this jurisdiction.

policy of using the suspended sentence only as a diversion from prison in the English legislative framework allowed a reasonable degree of control of the sanction by the legislature, notwithstanding the tendency of the judiciary to import an additional deterrent approach on their part. As noted this tendency to deviate from the statutory rationale of the sentence in England and Wales in part resulted in a decrease in the use of already existing alternatives to custody. Moreover, any tendency on the part of the judiciary to re-import deterrent principles was amenable to legislative correction even if, in the end, such corrective measures practically lead to the abandonment of the sanction. This top-down legislative approach instructing the policy which underpins the penalty of the suspended sentence is in marked contrast to the Irish common law approach where one observes the organic growth of the sanction in the Central, Circuit and District Criminal Courts from the 1920s onwards.

The introduction of the suspended sentence in England and Wales through the legislative route, to some extent allowed for a rational approach in the design, planning and review of the sanction whereas in the Irish context the penalty organically integrated itself into Irish sentencing practice. The continued use of the penalty depends largely upon an intuitive sentiment of Irish sentencers (Bacik 1999) and the sanction has not been subject to critical analysis in relation to its efficacy. Indeed, on these issues O'Malley concludes "it is difficult to identify any clear principles indicating the circumstances in which suspended sentences are appropriate" (O'Malley 2000:292).

But O'Malley considers the suspended sentence as a genuine punitive measure in itself by pointing out that there is a presumption the offender is liable to serve the full custodial sentence upon being found in breach of the sanction. Additionally he asserts that the operational period of suspension should be treated as another punitive element "because it represents the period during which the offender is constantly at risk of having to serve the entire sentence" (O'Malley 2006:456-457). However, O'Malley claims that the suspended sentence is capable of serving a number of penological aims either individually or collectively. These might include just deserts, rehabilitation and individual or special deterrence although general deterrence is seldom appropriate as the primary aim of the sanction (O'Malley 2006:458-459).

In the interview with the Judges, one respondent explained his use of the suspended

sentence and part suspended sentence as follows:

> "I suppose that when I order a suspended sentence, I feel that he or she does not deserve prison just yet and they should be given another chance. When I impose a prison sentence and then I suspend part of it, it's in the hope that they would be rehabilitated sufficiently in prison or would mend their ways. We just wait and see what happens… [It's] really in the hope that the rehabilitation process will continue. Basically it is to keep the person out of prison for as long as you possibly can. If you take the scenario for example of 6 years and suspending the final 2, what you are really thinking of then is (a) he has paid for the penalty; (b) he will have learned his lesson with the custodial sentence; (c) if he misbehaves when he is released from custody, he will be brought back". A3J1CC.

This approach to making the suspended sentence suggests a test of the future behaviour of the offender which test is subject to the conditions of compliance. The offender's behaviour is usually monitored by a probation officer and may be returned to Court if the offender is non-compliant. This view contrasts somewhat with O'Malley's expression of the suspended sentence where both the sentence of imprisonment and the period of suspension are considered essentially punitive in character. In the survey of judges on this point, the punitive element, while present, was rarely identified by them. Instead, judges tended to gravitate invariably to the controlling and rehabilitative functions offered by such suspended sentences. Quite a few of the Judges characterised their use of the suspended sentence as giving the offender "a chance" or "one last chance" before they would actually impose a custodial sentence.

The search for the rationale for the suspended sentence in Ireland presents distinct difficulties because the rationale must be gleaned from a series of conflicting cases which rarely if ever address the purpose of the sanction other than the issue of proportionality. In addition, the inaccessibility of decisions of sentencers in the lower criminal courts, where most suspended sentences are imposed, contributes to the difficulty in extracting a clear and singular rationale for the sanction. There is a distinct possibility that the purpose for the suspended sentence if stated at all in the superior courts may differ from the purpose for which the sentencing judges in the lower courts deploy the sanction. On the task of extracting the rationale for sentencing Osborough has observed:

> "The jealousy with which the Irish sentencer has viewed and thus sought to protect his individual prerogatives has not helped to create a climate of opinion favourable

> to the emergence of agreement on principles of sentencing. It is not surprising, therefore, that no such principles are readily discernable in respect of the suspended sentence." (Osborough 1982:237).

Notwithstanding these cautionary words O'Malley asserts that "the purpose of a suspended sentence is to keep the offender out of prison" (O'Malley 2006:456) quoting the English case of R.-v-Sapiano (1968) 52 Cr.App R.674. But perhaps O'Malley's assertion that the purpose of the suspended sentence in Ireland is to avoid prison is based upon less certain foundations. In Sapiano, Melford Stevenson L.C.J. stated:

> " The court is satisfied that is a wrong sentence, wrong in two respects, first that is really against the spirit and intention of the Act, because the main object of a suspended sentence is to avoid sending an offender to prison at all"; Melford Stevenson L.C.J. R.-v-Sapiano 1968 52 CR. App. R. 674.

The English Court of Appeal had the benefit of a statute to dissect which allowed them to conclude that the intention of the legislature, when framing the suspended sentence, was to avoid prison. As Osborough has observed above, but certainly before the passing of the Criminal Justice Act 2006 in Ireland, the rationale for the suspended sentence could only be located in the judgments and comments of the sentencing courts themselves.

Recent pronouncements on the suspended sentence by the Supreme Court and the Court of Criminal Appeal in Ireland suggest that the prevailing and underlying rationale for the suspension of custodial sentences is primarily within the special deterrent approach and only marginally within the avoidance of custody approach.[75] Although O'Flaherty J. asserts in O'Brien – v – Governor of Limerick Prison [1997] 2ILRM 353 that "the development of the suspended sentence was an innovation of the Irish judiciary" when he referred to Osborough's 1982 seminal article, he does not seek to expand upon this unique contribution by the Irish judiciary to world sentencing, particularly by making any specific reference to any of its underlying functions other than to assert "that it is obviously a very beneficial jurisdiction for judges to possess".

The earlier case of McIllhagga (supra) is significant as it is the first case where the Supreme

75 People (D.P.P.) – v – Alexiou [2003] 3 I.R. 513. People (D.P.P.) – v – Carl Loving (unreported) Court of Criminal Appeal 10th March, 2006.

Court pronounced on the operation of the suspended sentence. However, other than covering the disposition with the mantle of authority which the Supreme Court undoubtedly possesses, the court did not elaborate on the rationale behind the sanction. In the case of People (DPP) –v- Alexiou [2003] 3IR 513 we find a more recent judicial pronouncement on the suspended sentence.[76] The facts of the case disclosed that the accused Alexiou had been found in possession of illegal drugs with an estimated street value of €77,000 which could have attracted, on conviction, a presumptive penalty of ten years imprisonment as a minimum sentence in the absence of special and exceptional circumstances.[77]

Even though a central feature of the Alexiou case turned on the liability of the prisoner to be sentenced for a minimum of 10 years imprisonment as provided for under Section 15(a) where he was in possession of €77,000 worth of drugs, the case was ultimately decided according to the appropriateness of conditions attached to the suspended sentence which were essentially crime-preventative in nature.

The Court of Criminal Appeal per Murray J. approved the suspended sentence imposed upon the accused with the proviso that the imposition of the condition that the offender leave the jurisdiction immediately should not be in perpetuity but should be for a designated period of time and in the case of EU nationals generally, the condition might not be appropriate.

The Irish Superior Courts have steadfastly refused to issue guidelines to the lower courts in respect of sentencing matters (People (D.P.P.) – v – Tiernan [1988] I.R. 250).[78] Accordingly it is to be expected that the same courts have shown a reluctance to deal with sentencing issues in general but approach each matter on a case by case basis. Such an approach inhibits the emergence of a clearly enunciated rationale for the suspended

76 The court specifically referred to the individualised approach to sentencing which was pronounced earlier in People (D.P.P.) – v – McCormack [2000] 4I.R. 356 and which approach in the instant case the court approved. The Court of Criminal Appeal as per Murray J. addressed the specific issue of conditions attached to the suspended sentence, which required the convicted offender to leave the jurisdiction immediately as a condition attached to his suspended sentence of 4 years imprisonment. In this prosecution appeal against leniency, the D.P.P. alleged the Central Criminal Court was unduly lenient in imposing a suspended sentence on a South African national convicted under Section 15(a) and Section 27 of the Misuse of Drugs Act 1977 as amended.

77 In respect of possession of drugs for the purpose of sale and supply with a street value in excess of €13,000 (Euro Changeover (Amounts) Act, 2001), Section 15(a) provides that upon conviction a minimum sentence of ten years imprisonment should be imposed unless the trial judge is satisfied that there are special and exceptional circumstances.

78 The Supreme Court declared that it would not issue guideline judgements on sentencing in general due to the lack of statistical data on sentencing and having regard to the requirement for the sentencing court to consider each sentence appropriate to the particular circumstances of each specific case. In the instant case notwithstanding, the Supreme Court did declare that in rape cases such offences should always, except in the most exceptional circumstances, attract an immediate and substantial custodial sentence.

sentence. In the *Alexiou* case, Murray J. eschewed a more generalised approach when dealing with the suspended sentence when he stated:

> "The court is only concerned with the circumstances of this case and not with an abstract review of the kind of conditions which can be imposed when a sentence is suspended". (People (D.P.P)-*v*-Alexiou [2003], 3 I.R. 526).

Invariably, when the issue of a suspended sentence comes before an Irish court by way of judicial review or on appeal, the focus is always on the issue of proportionality or the mechanics of the sentence rather than on the rationale.[79] The opportunity to align the Irish suspended sentence with the stated objective of the English sanction presented in the case of People (D.P.P.) – v – Carl Loving (unreported, Court of Criminal Appeal 10th March, 2006) where counsel for the appellant strongly suggested that the principles enunciated by the English Court of Appeal (Criminal Division) in R.-v-David Ivanhoe Cohen Mah-Wing (13th October 1983) should apply. In that case the Court of Appeal (Criminal Division) held that:

> "When a court passes a suspended sentence, its first duty is to consider what would be the appropriate immediate custodial sentence, pass that and go on to consider whether there are grounds for suspending it. What a court must not do is pass a longer custodial sentence than it would otherwise do because it is suspended." Griffiths L.J. (R.V. Mah-Wing Court of Criminal Appeal (Criminal Division) 13th October, 1983 5 Criminal Appeals R. (s) 348)

However, the Irish Court of Criminal Appeal in *Carl Loving* did not follow *Mah-Wing* which it could have done by expressly approving the English decision and adopting the same principle in the instant case. Instead, Fennelly J. merely stated that "the court does not think that the learned trial judge has offended that proposition in the present case" (Fennelly J., People (D.P.P.) – v – Carl Loving Court of Criminal Appeal 10th March, 2006,

79 Notwithstanding the statutory minimum of ten years imprisonment for possession of drugs for the purpose of sale and supply pursuant to section 15(a) of the Misuse of Drugs Act as amended, the Court of Criminal Appeal approved the suspended sentence in the case of Alexiou therein approving also the dicta of Barron J. in People (D.P.P) –v- McCormack (supra). The reader will note the difficulty in extracting any clear principles for the imposition of penalties contained in the McCormack case other than that a court should consider all of the circumstances and should tailor a sentence according to the individualised circumstances of the offence and the offender. In the circumstances it is very difficult to extract a clear rationale for the use of the suspended sentence within Irish sentencing practice especially if one was to compare it with the approach taken by the German authorities in 1969 where suspended sentences were designed into the sentencing structure in such a way and for the specific purpose of avoiding imprisonment thereby reducing the prison population.

p.8 Bailli). When concluding for the Court of Criminal Appeal, Fennelly J. had the following important observation to make:

> "The court has accordingly decided to treat the application for leave to appeal as the hearing of the appeal and to reduce the sentence on count one to six month's imprisonment. In respect of count number four it reduces the sentence to one of 1 year's imprisonment.[80] The applicant has already spent more than one year in prison. This decision does not imply that the applicant should have received an unsuspended sentence in the first place. An examination of the cases shows that the courts had frequently imposed suspended sentences or fines in cases where much more child pornography was involved and where credit cards had been used. Where the offence is at the lower levels of seriousness, there is no suggestion of sharing or distributing images, the accused is co-operative and it is a first offence, the option of a suspended sentence should at least be considered". (Fennelly J. in People (D.P.P. – v – Carl Loving, Court of Criminal Appeal 10th March, 2006 pp. 8-9).

This part of the judgment seems to suggest that a suspended sentence might be considered and imposed without the court firstly deciding to impose a custodial sentence and that the suspended sentence occupies an intermediate position in the sentencing scale which is unfettered by any considerations of avoidance of custody[81].

The net issue in the *Carl Loving* case concerned the overall calculation of custodial time where a part-suspended sentence is imposed. The Court of Criminal Appeal concluded that the suspended part of the part-suspended sentence should be included in the calculation of the overall sentence of imprisonment. However, the case was ultimately decided again according to the principle of proportionality.

The opportunity to locate a clear rationale for the suspended sentence in Irish sentencing law also presented in the failed Criminal Justice Bill of 1967 when the Oireachtas sought to

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80 The accused was originally sentenced to two years imprisonment with the latter six months suspended and five years imprisonment with the latter two years suspended by the original sentencing court.

81 In Moore-v-Judge Brady and D.P.P., High Court (ex-tempore) 16thNov.2006, Feeney J. granted an order of Certiorari to the Applicant who initially had been refused legal aid by the first named Respondent, on the grounds that a suspended sentence was first and foremost a custodial sentence before it was suspended. The trial judge was obliged to revisit the issue of legal aid once the likelihood of a suspended sentence was contemplated. The case was constructed upon an interpretation of the Carl Loving judgement (supra) and O`Malley (2006:454) .

deal with the suspended in a statutory framework. Section 50 of the Bill provided:

Section 50

"(1) Where a sentence of imprisonment or fine (other than a sentence or fine which the Court is required by law to impose) is imposed on a person on his being convicted of an offence;

(a) the Court shall, subject to *section 49(4)(b)* of this Act, have power to suspend the sentence or fine on such conditions (other than a condition restricting the person's choice of a country of residence) as it thinks proper".

The use of the phrase "where a sentence of imprisonment… is imposed" could be interpreted as placing an obligation upon the court to deal with the penalty in accordance with *O'Keefe* principles as otherwise the sentence would emerge as a *via media* or lesser penalty than a truly contemplated custodial sentence. But, the section also contemplated the suspension of the payment of a fine provided the offender was compliant with specified conditions. This points clearly to a rationale of deterrence only as no issue of custody arises. However, the rationale for the current suspended sentence in Ireland cannot be gleaned from legislative proposals which failed to be enacted into law, however clarifying they may appear.[82]

At the time of writing this study there are few indicators to suggest that Irish sentencers impose suspended sentences exclusively in accordance with *O'Keefe* and *Mah Wing* principles as advocated by O'Malley (2000) and Walsh (2002). Invariably, the developed case law tends to deal instead with particular circumstances appropriate to the imposition of the suspended sentence for individual offenders (People (D.P.P.) –v- McCormack supra).[83] While the few reported cases may inferentially touch upon the *O'Keefe* principles, the ubiquitous use of the suspended sentence at all levels of the criminal courts in Ireland requires a more detailed study of the court's practices when using the suspended sentence and the purpose of such practices.

82 The rationale for the statutory suspended sentence under Section 99 of the Criminal Justice Act 2006 will be separately discussed in Chapter 7.

83 These touch upon, inter alia, the severity of a prison sentence upon a foreigner (People (DPP) – v – Alexiou supra) and the severity of custody on a person of advanced years convicted of sexual offences of some vintage (People at the suit of the DPP –v- J.M. [2002] 1IR 363) where public disgrace for both the offender and his family combined with his fragile state of mind and physical health warranted such suspension, age alone apart

A useful perspective on the operating function of the suspended sentence is revealed by examining either the specific conditions attached to a conditional suspended sentence or the particular circumstances of the offender, which may have had the effect of persuading the court to impose a suspended sentence instead of a real sentence of imprisonment.

The standard condition that the convicted person observes the peace clearly points to a special deterrent sentencing intention on the part of the court. Furthermore, conditions which seek to bring about a change in the behaviour of the convicted person such as a requirement to attend an alcohol or drug treatment centre, attend for anger management therapy, or conditions which seek to restrict the opportunities for offending in respect of certain types of offences such as provisions relating to geographical constraints and restrictions on contact with former victims must equally be seen as coming within the special deterrent paradigm primarily. These types of conditions are used every day in the Irish criminal courts and belong in the tradition of deterrent sentencing, tailored to the specific circumstances of the individual convicted person.

In the survey of judges, a Supreme Court Judge referred to the multiplicity of purposes of the suspended sentence in Ireland as follows:

> "I think there are a number of different purposes…one is to avoid imprisoning a first offender or a young offender while hopefully making some sort of impact on him. The other purposes are very specific to protect particular people or particular areas. I have seen suspended sentences on condition that people stay out of areas as large as a county. I remember the late Judge Neylan suspending a sentence on a shoplifter on condition that she stayed out of what he described as Grafton Street as it is understood in law, from College Green to Stephen's Green. He did that because it was early December and he anticipated that shopping would be disrupted" A8J1SC.

A condition that a convicted person pay restitution to a victim in respect of fraud or criminal damage done before a certain date as a condition of a suspended sentence leans however to the avoidance of custody approach as no essential crime prevention elements are inherent in such a condition (People (D.P.P.) –v – McIllhagga Supreme Court 1971 supra).

Moreover, there are some cases where a suspended sentence has been imposed which reveal that the avoidance of prison approach is the predominant consideration when passing sentence. Osborough (1982) suggests that a first offence committed in unique

criminogenic circumstances which is unlikely to be repeated may attract a suspended sentence[84]. In *McClure`s* case the court sought to register its disapproval of the offender's behaviour by imposing a sentence of six months which it then suspended because of the offender's particular family circumstances and as this was a first offence. The accused was thus given an opportunity to avoid custody but the sentence was also structured to deter the accused from similar acts of gross indecency.

It is not uncommon for an offender whose sentence has been deferred to finally receive a suspended sentence. In such a case the offender's behaviour would have been reviewed by the court for a period of time and the court having considered the issues such as restitution, remorse and the repetition of behaviour by the offender may finally decide to impose a penalty of imprisonment but may suspend such sentence on the undertaking of the accused to continue his/her good behaviour. This type of disposal imports elements of both approaches where prison is contemplated as a real alternative but the behaviour of the convicted person *in futuro* presents as a significant element in the disposal. [85]

The practice of deferring penalty and placing the offender under supervision of the Probation Service in the interim was subject to the criticism that there was no statutory basis for the Probation Service to engage with an offender in these circumstances and consequently no procedure for breaching such an offender during the period of deferment which could last for a number of months (Expert Group 1999; Comptroller and Auditor General Report 2004:19-20). One of the respondents in Halton's study of changing constructions of probation practice offered the following criticism of adjourned supervision:

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84 He cites the case of a man convicted of gross indecency who was married with two small children who was sentenced to fifteen months imprisonment. This sentence was substituted by the Court of Criminal Appeal with a suspended sentence of six months, the Court of Criminal Appeal having been informed that the accused and his wife had ceased marital relations, combined with the recent news that one of his children had special needs. In the Court of Criminal Appeal Black J. observed that the offence was "an obnoxious offence" but nonetheless:

> "… does not prevent it from having varying degrees of gravity according to the circumstances. Care must be taken to differentiate between these circumstances, and to graduate the punishment with a due sense of proportion. One circumstance vitally effecting gravity is the likelihood of repetition. That is particularly true of the offence in question; for it is well known that it is a form of depravity to which certain people become addicts. A first commission of this crime is far from foreshadowing its repetition to the extent which a second or third commission would" Black J. People (A.G.) – v – McClure [1945] IR277).

85 This type of disposal is not uncommon in the Circuit Criminal Court where serious offences which warrant custodial sentences are tried. The offender is usually placed on adjourned supervision under the Probation Service while a social enquiry report is prepared. This report may also deal with the offenders addictions to alcohol or drugs. While the report is being prepared, usually over a four-month period, the offender may present as compliant with probation supervision and drug treatment. Notwithstanding the seriousness of the offence for which the offender has been convicted and which would normally attract a sentence of imprisonment, the court frequently places the accused directly on a suspended sentence if satisfied of the likelihood of continued compliance by the offender with conditions tailored to his/her crimogenic circumstances.

> "I think the Judges use it as a form of punishment. I think this adjourned supervision is used as a stick. They use it to test offenders' motivation to stay away from crime"(PWOJ in Halton 2007:189).

The development of adjourned supervision in the view of this probation officer was synonymous with "a progressively more punitive response to offenders, placing more pressure on them to conform" (Halton 2007:189). There is no doubt that adjourned supervision presents professional challenges to the probation officer who is tasked with supervising an offender during deferment of sentence. However, Halton's respondent correctly identified the courts approach to deferment of sentence as a test of the offender's behaviour while under the controlling function of the probation officer. But ultimately, the offender`s failure or compliance with the test is critical to the decision to suspend a sentence or not.

In a recent case before the Central Criminal Court in Limerick the sentencing judge, Carney J., finally disposed of a manslaughter case with a fully suspended sentence after a long period of adjourned supervision. The accused had received psychiatric treatment in the meantime as part of the adjourned supervision and was again living back in the family home with his father. Prior to the accused killing his mother he had lived for quite a few years at home but suffered significantly from depression. At the time the offence was committed the deceased had been heavily intoxicated and was provocative towards the accused. Carney J. imposed a sentence of life imprisonment suspended for life and made the sentence unconditional but recommended that the accused would continue to receive psychiatric treatment. Specifically the sentencing judge stated that the purpose of such a sentence was "to control the future behaviour of the accused and not to punish him" (People (D.P.P.) - v - Donnan, Central Criminal Court, Limerick, 15th July 2006, Irish Times)[86] .

Thus, adjourned supervision is deployed as an initial exploration of the offender`s intention and capacity to comply with conditions of good behaviour. If the court is satisfied upon review, it is customary to dispose of the case by way of a suspended

86 Subsequently the Defendant Mr. Donnan was breached for not reporting 2 or 3 times a week with his Probation Officer. Evidence given by a Probation Officer suggested he was using alcohol and drugs including heroin and had ceased to take the prescribed anti-psychotic medication for a number of months. Upon breach, Carney J. imposed a life sentence for manslaughter, but back dated the commencement to the date of arrest in 2000. The sentencing judge specifically referred to the purpose of the suspended sentence in this case. He said the object of the suspended life sentence was for the court to always keep an eye on him. He said he had been so careful to observe the special considerations in this case that the offender had been before him on 37 times while a suitable program was designed for him (Irish Examiner 3rd July 2008:8).

sentence. Sequentially, a custodial sentence may initially be contemplated but this may be avoided if the offender proves to be a good prospect for suspension of sentence upon review.

Frequently, a sentence may be suspended on the specific condition that the offender would not interfere with the victim of the specific crime under consideration or more generally would keep the peace and be of good behaviour. In a highly charged and controversial rape case before the Central Criminal Court, Carney J. wholly suspended the term of imprisonment and had the accused bound over to keep the peace. When the parties to the case, all from County Clare, were returning home through Heuston Railway Station in Dublin on the evening of the case, the accused "flipped a cigarette butt" in the direction of the victim. This was widely publicised in the media in conjunction with criticism of the original suspended sentence imposed. Soon afterwards, the accused, Adam Keane, was arrested on a warrant from the Central Criminal Court and was given the full custodial sentence which had been suspended. Clearly the control of the future behaviour of the offender and specifically towards the victim was the primary focus of the Court when it made the original sentence and later revoked it. Any reference to the punitive element of the sanction remained subliminal until the breach was proven and only then did the punishment emerge as the primary focus of the sanction. In the 2 cases above, punishment must be seen as a residual and contingent purpose of the suspended sentence. If the offenders *Dornan and Keane*[87] had not breached the conditions of their suspended sentences, the punitive element of the sanction would have remained in abeyance and subservient to the primary purpose of control of the offender

Accordingly, it is not possible to state with any degree of certainty that the rationale for the use of the suspended sentence in the Irish criminal courts is to advance the singular purpose of avoiding sending a convicted person to prison. Undoubtedly this purpose is promoted regularly in Irish sentencing practice but the intention of the court to control the future behaviour of the convicted person as a special deterrent usually prevails as the dominant purpose of the sanction.

Even though it is argued in this study that Irish sentencers place significant emphasis on

87 The DPP independently appealed the original sentence of 3 years imprisonment suspended to the Court of Criminal Appeal on grounds of undue leniency. The Appeal Court overturned the original sentence and replaced it with a full custodial sentence of 10 years with the latter 3 years suspended. (Director of Public Prosecutions –v- Adam Keane [2008] 2 I.L.R.M. 321-343)

the special deterrent feature of the sanction, studies from other jurisdictions suggest that the use of the suspended sentence as a deterrent instrument may not yield the same intended results (Easton and Piper 2005:111, Edney and Bagaric 2007:56, Weatherburn and Bartels 2008:679, Searle *et al* 1998:123,Soothill 1981:22). Walker came up with a potentially startling result when he concluded that reconviction rates for imprisonment were lower than for suspended sentences. Arguably, he concluded, the efficacy of the suspended sentence may have the effect of increasing and not decreasing the likelihood of further offending (Walker 1991:44).

When writing on the suspended sentence in Ireland, Osborough (1981) questioned whether the suspended sentence was ever meant to mean anything more than that a custodial sentence had been passed and was then pronounced suspended. The "expressive" nature of the sentence may also be its sole purpose without any real intention to cause the offender to suffer any further consequences as a result of its pronouncement. Some evidence of this approach to the use of the suspended sentence is evident from the replies of particular respondents in the survey. The use of the sanction in this manner may also support the argument that the suspended sentence is an instrument of a bifurcatory approach to the disposal of criminal cases where repeat offenders are given more severe penalties such as immediate custody when compared with first time and white collar offenders who commit relatively serious offences and are given a suspended sentence (Tait 1995:150).

A survey of the Irish case law, while not yielding a corresponding rationale with the stated rationales from other jurisdictions, does present a series of objectives some of which are deprecated in those jurisdictions. First, the suspended sentence is sometimes used to avoid an immediate custodial sentence (Osborough 1982:239). Secondly, the decision of the Court of Criminal Appeal in the case of *Carl Loving* (supra) is not unusual for advancing the use of the suspended sentence as a sentence on the scale below that of a custodial sentence. It is not uncommon for cases of dangerous driving causing serious injury or even death to be disposed of by way of a strong denunciatory sentence of imprisonment suspended for a number of years[88]. Usually the court opines that no purpose would be served by sending the particular offender with an unblemished record to prison. In such

88 The sentences imposed at first instance in DPP-v-Keogh (Supra) and DPP-v-O'Reilly (Supra). As already noted, these suspended sentences were quashed and replaced by community service orders on appeal.

cases it is not uncommon for the defendant to have a family and to be in good employment. Instead, the court might impose a custodial sentence and then suspend it as a denunciation of the behaviour. A third possible use of the suspended sentence is suggested in the use of conditions attached to a suspended sentence which present the offender as a malleable subject capable of being moulded into a changed person provided s/he complies with conditions designed for that purpose. This presents the sanction as a controlling and rehabilitative device. Fourthly, and allied to the latter issue is the use of the sanction to specifically deter the offender from committing similar or other offences in future or at least while under the shadow of a prison sentence which is suspended. Fifthly the suspended sentence might be regarded through a wider lens. In this scenario the sanction, if applied widely, may be utilised as a crime prevention strategy for certain types of offences such as car theft, assault upon police or crimes of domestic violence. Thus, offenders who fall into theses categories may be given suspended sentences not only to show the court's strong disapproval of these specific offences but to control the future behaviour of such offenders in these specific categories.

It is likely that Irish sentencers generally look to the deterrent elements of the suspended sentence, expressed as conditions attached to the suspended sentence, as the predominant factor when deciding to impose a suspended sentence rather than considering the imposition of an immediate custodial sentence.[89] This is more likely to be the approach adopted by sentencers in a large number of less serious offences such as assaults and public order offences, whatever about the desirability expressed by O'Malley (2000) and Walsh (2002) of using the penalty exclusively in lieu of custody.

Generally, the case law dealing with suspended sentences yields little other than a discussion upon the mechanics of the sanction such as how and when to breach and issues of proportionality. Ultimately the search for the rationale of the suspended sentence in Irish sentencing practice must be located in the sentencing or trial courts and not in the reflective appellate courts as one might expect. The overarching principles of proportionality and particularly the requirement to individualise a sentence according to the circumstances of the offender and the offence present a challenge to the standard interpretation of the suspended sentence solely as an alternative to custody.

89 People (D.P.P) – v – Donnan, Central Criminal Court, 15th July, 2006, Irish Times.

What Do Irish Judges Perceive They Are Doing?

When interviewed on the purpose of the suspended sentence; on what they as sentencers intended to achieve when they used the sanction and who might be suitable for the sanction, the judges gave a wide array of replies. These touched variously upon: the avoidance of custody, the strong deterrent value of the sanction, responsibilisation of the individual offender, rehabilitation of the offender, the use of the sanction as a symbolic gesture, giving a last chance to an offender and managerial considerations in the disposal of pleas of guilty. Some of the judges expressly mentioned that the sanction was imposed in lieu of a custodial sentence:

"Normally I would send that person to prison but I am looking here for this new

"I believe that the judges should not send people to prison except as a last resort and I see it as part of that process. That you have a view that the crime is so serious that they ought to go to prison but then some circumstances put forward that allows you to give the Defendant one other chance and that is the way I would use it. In order to keep from sending people to prison. It is the last chance that they have."A1J1DC.

"…where I have come to the conclusion that a custodial sentence is warranted but where I have been persuaded that for some good reason it might be better to impose a deterrent upon this offender; to persuade him to change his ways with literally the threat of imprisonment hanging over him. I appreciate that preventive detention is alien to our law but this is not preventive detention but it is a serious threat hanging over the offender that there are consequences of re-offending. In a word the deterrent effect is what I wish to achieve…to ensure that for a period of a year or two that he will not reoffend."A4J1DC.

"First of all I find that before a sentence is imposed as a last resort, you have to first of all decide to sentence somebody and then the suspension is the next question. You feel that with that hanging over their head, it will act as a very real deterrent. Of course, if they have a long list of convictions, it is useless but deterrence is the purpose of it rather than punishment."A7J2CC.

"A belief that prison was not merited in respect of that particular accused…the sanctioning of the accused person without exposing him to a prison regime…it is a punishment in its own right."A9J1HC.

Meanwhile the respondent in the Supreme Court looked upon suspended sentences in general with a sense of scepticism when he stated:

"I don't tend to favour suspended sentences simply for this reason that I think that sentencing is the rough end of the business of the Courts when it comes to public perception and I think the sentences perhaps should be structured ideally on the basis of what you see is what you get… [A]s I say I don't tend to favour suspended sentences…[as]things in themselves. The more serious the case, the less suitable it is in principle but you have to consider the Defendant as well and the younger the Defendant or the fact that he has a clean record, those are very significant considerations. There may also be considerations such as the effect of even a short sentence on him, for example people who may lose their job if they serve any time at all in jail. The length is immaterial. In that case one might consider it but in general my reservation is as what I said that I think sentences ought to be easily comprehended. There should not be small print in them ideally and one does see suspended sentences with a huge amount of small print…I mean I think the man on the street becomes cynical if he sees a sentence with huge portions of it suspended. He tends to say what does that mean? And even a long sentence, newspapers as you may have noticed tend to report a sentence without regard to the fact that all or some of it is suspended. You have to read the second or third paragraph. I think that makes people very cynical. They think that you would not know. There was a remarkable case in Cork some years ago where an individual, I think it was a religious charged with multiple counts of assaulting boys, got you could say a sentence in excess of 30 years but only 18 months was to be served. The example of the sex case, I have mentioned, oh there was a huge sentence but only a tiny amount to be served."A8J1SC.

Whatever about the efficacy of deterrent sentencing in the literature, the judges interviewed placed significant emphasis on the deterrent value and purpose of the suspended sentences which they make:

"Where he is at the very lowest category which would warrant a prison sentence for a start. Secondly where there is something to be achieved in terms of deterrence into the future and a lot of cases have that whether it is public order or whether it is domestic violence or a whole lot of other things where his future behaviour contributes tremendously to people outside of him; where there is a benefit to other people."A4J1DC.

"It is a deterrent and that is how I would use it."A1J2DC.

"I look upon it as a deterrent."A1J5DC.

Some of the judges emphasised the rehabilitative aspect of the suspended sentence which hopefully would follow a severe reprimand and a suspended sentence or as a regime imposed on the offender to change his/her lifestyle;

"A last warning before prison…like J3 had originally said at the start, where he was going to

imprison somebody but effectively was talked out of it or persuaded out of it, I would not be that far with this person, before I would impose a suspended sentence…I wouldn't be quite there yet before I would give him a suspended sentence…if the guy came back to me on another charge, the next time he was guaranteed practically a prison sentence on the next charge…" A4J5DC.

"I suppose when I order a suspended sentence, I feel that he or she does not deserve prison just yet and they should be given another chance. When I impose a prison sentence and then suspend part of it, it is in the hope that they would be rehabilitated sufficiently in prison or would mend their ways…it is really in the hope that the rehabilitation process will continue."A3J1CC.

"…you intend that somebody gets a chance who maybe is at a stage whether they are going to change…a lot of the young people in particular that you deal with, they are sort of off the radar, they have no work. They have got no cardinal points. They have got no discipline… if you can keep them straight for a year, keep them off drugs, keep them out of trouble, keep them off the streets at midnight, it would be a huge difference in their lives and could lead to an ultimate eventual long standing change."A5J1CC

Other Judges highlighted the punitive element of the sanction thus:

"It is a sentence of imprisonment hanging over your head for a period of time which does not allow you, if you like, to break the law for that period so there is a punitive element. It's not as punitive as going to jail and likewise the partly suspended sentences are more punitive."A5J1CC

"You've a criminal record with the sentence, and whether that be a sentence or a suspended sentence, it is obviously more serious than an offence for which a fine has been imposed. If somebody goes for a job interview or work, anything, wanting to get a visa to travel, clearly the fact that he has actually had a suspended sentence imposed would raise eyebrows far more than something like a minor fine…in an actual custodial sentence, anyone looking at that must take the view that the offence must have been more serious than one for which a suspended sentence was imposed."A2J1DC

But the real purpose of the suspended sentence according to the latter judge is:

"To try and stop the offender from committing any further offences. That's the main reason for it. To get out to him that he is on risk of actually serving the sentence if he does." A2J1DC.

No less important are managerial considerations to facilitate the work of the Court. A timely offer of a plea of guilty may prove to be the decisive moment when a suspended sentence as opposed to an actual custodial sentence is forthcoming:

"If you have a person who has been before the Court a number of times, e.g. for drunk driving, or no insurance or public order or say assault or something like that, and if I felt that in the circumstances, say for arguments sake that there was a plea of guilty in the matter, and factoring all the factors that are generally put up in those particular circumstances, I would possibly consider a suspended sentence as an appropriate order and deterrent before I might consider a sentence."A6J1DC.

"Of course you do start off on the basis that he is entitled to a discount because he has pleaded guilty. For example he certainly is saving the Court this time but certainly he is saving considerable expense…it is a serious offence, whatever he has pleaded to; suspended sentence is rarely used when the Jury makes a finding. Rarely used - suspended sentences *simpliciter.*"A3J1CC

"Of course the plea of guilty puts it in a different grade in terms of sentence. That is one of the factors that must be considered so that if he was just about to get a full sentence after a full hearing, but instead pleaded guilty, then I think I might just make it into the lower category. It just might be the swinger…if it were a case with a lot of witnesses and some perhaps reluctant witnesses and a whole lot of circumstances that would make it, perhaps more difficult to prove a plea of guilty in those circumstances could, for me, definitely tip it away from a full sentence…equally if he is caught red-handed, where pleading guilty makes no difference; where he is going down in a way, there is no defence to it, then the discount he will get from me will be much less."A4J1DC

Other judges regarded an early plea of guilty to mitigate the actual term of imprisonment without suspension thus:

"A lighter term of the same sentence."A4J1DC

"I think an early plea of guilty, on the authorities is the biggest mitigating factor there could be and furthermore it is one that is binding on every sentencing court. You have to pay attention to it. In recent times, there has been authority for the proposition that you can impose the maximum sentence even though there has been an early plea. You don't have to reduce the sentence but the offences in question in those cases including the ones which have been in front of the Court of Criminal Appeal were of the most aggravated and the most alarming kind. In the ordinary case or anything resembling an ordinary case, it is the largest factor. I personally wouldn't tend to reflect it by part suspension. I tend to reflect it by a reduction in the tariff. I have been very impressed also by the statement by the English Court of Appeal which is quoted in O'Malley's book. He says because there must be a jail sentence does not necessarily mean that it must be a long one and he says that particularly with regard to first offenders. Of course if you took O'Malley literally on first offenders, it would be very hard ever to imprison anyone I think there is a great deal to be said for that. I also think that in an urban environment, particularly you are very conscious of the fact

that so often sending a young person to jail, you are starting a vicious circle from which he may or may not ever emerge."A8J1SC

Certain offender characteristics may persuade a Court to lean in favour of suspending a custodial sentence. One Judge put it thus:

"Well, my criteria would be to first of all have a penalty which is more suitable to the offender and I use an example of where the offender may be just not a good candidate for prison. He may be vulnerable. He may have proclivities, he may have inclinations, he may be small and easily to bully. He may be a sex offender or maybe he is overtly or clearly effeminate and gay. I just don't think that is a nice place to put a troubled man or a man who is just not a good candidate; or maybe just under the average intelligence; he may be lacking somewhat in intelligence or cop-on. He just may be a poor godforsaken fella who would be bullied and worse and just prison would be quite unsuitable. To some extent I am looking and saying is there a better alternative for this particular man. He is not a good candidate for prison but for all that, applying the second criteria, he has to be brought to a realisation that he is one step away from a prison cell and that this is where you get the opportunity to say in view of the offence or perhaps it is re-offending behaviour, it is the view of this court that a custodial sentence is appropriate but then given as J4 has said, given the efforts to be made by the defence solicitor in the pleading of the defendant, not to send him to prison where you say well, alright, I will be persuaded; I will look at an alternative and then thirdly, in the criteria, the prospect or the hope that in this penalty some greater good may be achieved not only for the offender but for the community at large."A4J3DC

While in the Circuit Criminal Court, two judges expressed it thus:

"I will give you an example. If a student is caught with a certain amount of drugs - his first offence; he is an engineering student or a medical student. The Act is clinical. You do this and that happens but likewise now he is never going to be able to go to America with the conviction. He is never going to be able to perhaps practice at what he had thought he was going to be doing. That would never be envisaged or couldn't be taken into account in the Act (Misuse of Drugs Act 1977). In that rare scenario, I might consider a suspended sentence."A7J3CC

When it was pointed out by the writer that the convicted student would still have a conviction recorded against him, his colleague came to his defence as follows:

"Yes but he is saying because this chap has already suffered significant penalties without even anything further that you can impose."A7J1CC

Certain categories of offences were identified which should normally attract a severe

sentence and where suspension should not be considered:

> "…you regard the seriousness of the offence in structuring a sentence or considering on whether a jail sentence should be imposed, then society from time to time regards some offences more serious than others. For example there was a spate for a long period of years here with Section 112 Offences (Unlawful Taking of MPV) which I always refer to. It wasn't until the Courts started jailing people for that (crime) that they came back (down). Now society is beginning to take huge exception to people with guns because of the amount of latter day events with people being killed and shot and people with drugs. They weren't regarded with the same seriousness by people as they were 5/10 years ago…the Courts will reflect society's view."A7J3CC[90]

In contrast, a Judge in the Central Criminal Court took a contrarian view:

> "I would consider many more cases suitable for suspended sentence than I feel I am allowed to deal with in that fashion because society does not have a tolerance of these sort of cases I am dealing with. Where, in my view, in many cases there is no pre-meditation, and people are acting on foot of the compulsion of alcohol or drugs without ever intending that they are going to put themselves in that situation and I find it hard to find moral blame in that circumstance but society demands a punishment and a severe punishment."A9J1HC

Others identified categories of offences which should attract suspension of sentence instead of a full custodial sentence where society and victims would achieve greater benefit. Examples of such offence types were repeat offences for no insurance, repeat offences for "drunk driving", repeat public order offences and a breach of Barring and Protection Orders (A1J1DC, A4J3DC, A2J1DC).

Thus, no clearly defined rationale for the suspended sentence in Irish sentencing practice may be seen to emerge and to hold supremacy in the interviews above. The purpose of the sanction is not fixed for all cases but is seen to change with the context of the case and the offence, as well as the circumstances of the offender. Some suspended sentences are clearly deployed to avoid the imposition of a custodial sentence while the judges appear to look to the future in the hope that a change may be effected in the offender's behaviour, whether under threat of imprisonment or as a result of some form of therapy. The critical question is whether the practices of the Irish judges differ to any significant degree from

90 While judges are aware of public concern on specific types of offending for example, a serious rise in "joyriding" (Section 112 Road Traffic Act 1961), they themselves will occasionally declare that a certain type of offence of particular concern is likely to be met with a severe penalty. However, when this occurs, it is more likely to be as a result of a confluence of judicial and public sentiment than as a direct result of any political pressure (Roberts and Hough 2005:78).

the practices of judges in other common law jurisdictions. If such differences were evident particularly in relation to an expressed application of the suspended sentence as a decarcerative instrument, one might expect to see better outcomes from such practices. However, the stated views of the judges point to so many conflicting rationales for the sanction, it is unlikely that superior outcomes are achieved in the Irish jurisdiction.

The Rationale for the Suspended Sentence in the Reviewable Sentence or Butler Order and the Part-Suspended Sentence.

The purpose of the suspended sentence may be analysed from a different perspective when the reviewable sentence or Butler Order is considered. The reviewable sentence and the part-suspended sentence must be distinguished from the wholly suspended sentence where in the latter case no period of custody at all is required to be served by the accused. In the former two disposals a period of custody is specifically required to be served in advance of any partial suspension of the remainder of the sentence.

The Butler Order or reviewable sentence, which will be discussed more fully in Chapter 6, presents as a sentence which advances two distinct sentencing objectives in succession. The initial custodial sentence is reviewed by the court after a fixed period of time and if a convicted person can persuade the court that s/he has complied with prison discipline and usually has remained drug free while in custody or has undergone a course of treatment, the court usually suspends the remainder of the sentence upon the convicted person entering into a recognisance to keep the peace for the period of the suspension. The initial period of incarceration may be interpreted as the application of a punishment or retribution for the crime committed but also may be viewed as a necessary period of stabilisation where the offender commences his/her initial period of rehabilitation from an addiction. The second period of the reviewable sentence might be characterised much more as a period of rehabilitation of the convicted person and the control by the court of his/her future behaviour.

When asked why do judges impose a part suspended sentence as opposed to imposing a full term of custody, one judge reflected on the former use of the reviewable sentence and its function as follows:

> "This is a very difficult one to answer and for a long time I was of the view that it should be less than a full term. But that was in the days when we had power to review our judgement or our decisions when you would say "I am sentencing you to 5 years in prison but I will review this in 2 years and then if you were told that everything is going well you would come to that conclusion (to suspend). But now that we are not allowed to do that, that's really where the suspended sentences come in…to be fair to the accused if he has mended his ways and some do very well in prison. They often do their Leaving Cert., they do Open University courses, they do trades. They do physical fitness courses, they do all sorts of things. If they are progressing well and the probation service and all the prison authorities tell you they are getting on well, you keep a certain view". A3J1CC.

The limited statutory form of reviewable sentence contained in Section 27(3)(g) of the Misuse of Drugs Act 1977 as amended is specifically tailored to allow the court to review a sentence of imprisonment after 5 years has elapsed of a sentence of 10 years or more. The convicted person must be a drug addict or was formally a drug addict and the addiction must have been a substantial factor in the commission of the offence under Section 15(a) of the Misuse of Drugs Act 1977 as amended. O'Malley characterises such review of sentence followed by a suspension of sentence as an exercise in rehabilitation. (O'Malley 2006:334). However, the power of the court to utilise this form of reviewable sentence is predicated upon the imposition of an initial sentence of 10 years or more because a review under Section 27(3)(g) can only be made where a sentence has been imposed under Section 27(3)(b) originally (People (D.P.P.) – Dunne, Court of Criminal Appeal 17th October 2002, [2002] 4 I.R. 87). While O'Malley regards the purpose of Section 27(3) (g) as "clearly rehabilitative" (O'Malley 2006:334) the overall thrust of Section 15(a), which stresses a presumptive sentence of 10 years imprisonment or more is clearly deterrent and retributive in nature.[91] The statutory prohibition against the court conducting such a review within the first 5 years of the sentence must also be interpreted as advancing the principles of deterrence and retribution where a significant custodial sentence is required to be served before suspension of the sentence may be allowed. But perhaps Section 27(3) (g) also partially answers a common difficulty for sentencing courts when dealing with offenders who are addicted, without obliging the court to structure the sentence entirely in custodial terms.

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91 Section 33 of the Criminal Justice Act 2007 amends Section 27 of the Misuse of Drugs Act 1977 by the substitution of Section 27(A) to (K). Section 37(3) (A)(New Section) prescribes a sentence of imprisonment for life or such shorter period as the court may determine. This however is subject to a certain level of discretion that the courts may exercise in departing from a presumptive minimum sentence of 10 years imprisonment on conviction for possession of drugs for the purpose of sale or supply (Section 15(A) or importing drugs into the State in similar circumstances to value in excess of €13,000. The new Section 27(3) and Section 27(3)(K) repealed Section 27(3)(G)as discussed above. The new sub-sections repeat the statutory power of the Court to review a long sentence of imprisonment in excess of 10 years, but subject to the consideration of the offender's drugs using characteristics contained in 27(3)J and the requirement that there is a minimum custodial period of 5 years to be completed before a review may be permitted.

Thus, the statutory review of sentence allowed under Section 27 may be seen as a *via media* provided by the Oireachtas to mitigate the harshness of a presumptive 10 year minimum sentence expected under Section 15(a) or 15(b) but which sentence nonetheless does extract a significant period of retribution by requiring an initial 5 year custodial sentence to be served before suspension may be permitted or even contemplated.[92]

Thus, reviewable sentences whether by way of Butler Orders or under Statute (Section 27 Misuse of Drugs Act 1977 as amended) present as a mechanism to allow the extraction of punishment by way of a custodial sentence before the court usually allows the suspension of the remainder of the sentence. In this latter period of the sentence the character and purpose of the sentence is transformed from retribution to one of rehabilitation and control of the offender.

Similarly, when considering a part-suspended sentence the initial period of custody advances a retributive rationale while the latter part of the sentence advances rehabilitative and controlling functions.

LOCATING A SUSPENDED SENTENCE IN THE SENTENCING DOMAIN

Thus far, it is noted the suspended sentence in Ireland emerged at the beginning of the twentieth century as a judge made disposition. Thereafter in this chapter a review of the suspended sentence was presented with particular reference to the statutory sanction in England and Wales to illuminate the Irish suspended sentence and to delineate its common and divergent features. The search for the rationale of the Irish suspended sentence remains inconclusive while the avoidance of custody and the role of special deterrents occasionally combine as joint objectives of the sanction and at other times compete for dominance in particular cases. But in the overall scheme of sentencing where is the suspended sentence located? On the one hand, the suspended sentence is first and foremost a custodial sentence which is not brought into being unless certain events occur. But the suspended sentence when viewed from another angle resembles the probation order where again a sanction is withheld, albeit unspecified, until the offender fails to remain compliant with conditions of his/her probation bond.

92 In practice the presumptive minimum 10 year sentence under Section 15(a) has proven to be the exception rather than the rule, the average sentence has worked out at about 6.5 years imprisonment (Kilcommins et al 2004).

But the "custodial" designation of the sanction is only nominal unless the sanction is invoked for breach of conditions. If conditions are not breached or proven to be breached the custodial sanction cannot be activated. Thus, while the suspended sentence may be initially identified as occupying a position just short of a custodial sentence it cannot be equated with a custodial sentence.

When the offender signifies his consent to be bound under the conditions of a suspended sentence certain actuarial considerations may be seen to apply. The scant possibility of ever having to serve the custodial sentence, even if in breach of conditions of the bond, has been one of the most salient features of the suspended sentence in Ireland to date. Widespread knowledge among the criminal fraternity and the legal community points to this feature of the sanction (Osborough 1982:254-255). One senior judge confirmed this view by offering an insight into the offender's cognitions:

> "…I think the Courts have to be, especially the criminal courts, have to be credible to the criminals…The criminals are surprisingly sensorious of what they see as undue leniency, as inefficacy, and it almost peaks their professional pride and certainly if they know that the reality is that this sentence will not be reactivated. If it is going to be used, it should be taken seriously and re-activated when called upon. For many years when I was practising, it was a complete joke because nobody ever reactivated it…I believe now that things in the District Court and the Circuit Court, things are coming together … there is a big group of people for whom the mere fact of this court case pending is sufficient to achieve the purpose of a suspended sentence, if that hasn't achieved the purpose, I am a little cynical as to whether a suspended sentence will."A8J1SC

The latter judge and a judge of the Circuit Criminal Court pointed to the likelihood of continuing criminality on the part of the offender on a suspended sentence as follows:

> "…I have to admit that one of the worrying aspects of the suspended sentence on conditions is… whether the Guards are supervising it or the Probation Service, there just isn't any real supervision (of the conditions). If somebody is on a suspended sentence subject to conditions and commits a bank robbery, you will hear about that. But there are myriad and numerous other cases of infractions which you never hear about."A5J1CC

> "The other thing as we all unfortunately know is that there is a large group in the community for whom we know that by the time the suspended sentence is activated, there will be other sentences and they can all be run in (concurrently)". A8J1SC

These latter views suggest that certain offenders may apply a calculus when they enter into a bond under a suspended sentence to abide by certain conditions and further apply that calculus to their behaviour during the period of suspension. When armed with the knowledge that the possibility of serving out the sentence is indeed slim, the offender may be seen to have achieved a significant contractual bargain when the sentence is thus suspended.

As noted, it is doubtful if the Irish sentencing courts and particularly the District Court proceeds to structure the suspended sentence by firstly applying the *O'Kaefe* principles of custodial necessity before then going on to suspend it. Such practices tend to obscure the location of the suspended sentence on the sentencing scale. Is it higher or lower than the fine or probation or is it in joint position with custody?

Most of the judges position the suspended sentence just below the custodial sentence, although a few did place it on par with community service or just below it.[93] In one focus group the judges identified the Community Service Order as a form of suspended sentence:

> "It is a suspended sentence. It's an extra element that you have to contribute something – the work". A4J2DC

While a judge of the Circuit Criminal Court stated:

> "I put it on the same level as the CSO and next to the imposed custodial sentence in severity."A5J1CC

A wholly different perspective on the ranking order of the suspended sentence was offered by a Judge of the Supreme Court:

> "I wouldn't rank it very high, again because I allow myself to be guided by the way in which people who you might describe as occupational criminals have viewed it. Again, just like community service, they really only ask one question - does it involve going to jail? I once or twice had clients

93 Interestingly, the "mood" in one focus group placed the suspended sentence above community service while the "mood" in another focus group placed it firmly on par or below community service. While these views are interesting in themselves, the dynamics of focus group discussions are not to go unheeded in this analysis.

> who got very long suspended sentences and you know in those circumstances you would be obliged to point out to them (the fact that a custodial sentence has been imposed but only conditionally suspended). I remember having a drugs client who got a sentence of 10 years suspended. He was over the moon. And from his activities to date, I strongly suspect that the sentence would be activated, but I remember having difficulty persuading him that that was a reality. Of course at that time until very recent times all the time I was practising at the Bar, I very rarely if ever heard of a suspended sentence being activated. It's much commoner now."A8J1SC

Irish sentencers appear to invest a certain amount of faith in the deterrent effect of a suspended sentence on the behaviour of the individual offender, otherwise why would they use the sanction so extensively? However, Bottoms suggests that "it is reasonable to assume provisionally that this sentence has little, if any, special deterrent effect" (1981:18), when he surveyed the efficacy of the suspended sentence in the literature (Shoham and Sandberg 1964). Accordingly, by applying the suspended sentence in the belief that the "special deterrent effect" is efficacious, the court may unwittingly depart from a proportionate sentence having regard to the seriousness of the offence.

If the sentencing aims of the court are primarily to deter the offender from further criminal behaviour, it may be argued that the suspended sentence may not sufficiently answer those aims by ignoring other alternative non-custodial interventions such as the probation order, the community service order and the conditional discharge. Thomas (1974) has described this tendency by the courts to use the suspended sentence instead of utilising sanctions specifically designed for this purpose as an ambiguous penological approach on the part of sentencers.

The Irish judges, with the exception of the Respondent in the Supreme Court, tended to locate the suspended sentence in close proximity to imprisonment or at least within the orbit of the custodial sentence. However, the tendency of some judges, particularly in the Circuit Criminal Court to combine the suspended sentence with some form of supervision by the Probation Service, may simultaneously place the location of the sanction at a number of different levels of the sentencing scale.

An offender placed on a probation order may be breached by the probation officer if s/he fails to comply with the terms of the probation bond. Moreover, in a straight-forward probation order the offender is inducted into a formal rehabilitative structure where

professional guidance is available to the offender and further referrals to outside agencies such as alcohol or drug treatment may be arranged to facilitate the offender's rehabilitation. In contrast, under a suspended sentence a condition such as the requirement to remain drug or alcohol free may be unsupported by a professional intervention through the offices of the Probation Service. The recent tendency in many western countries to combine the suspended sentence with probation suggests a shift on the part of policy makers to combine the deterrent elements of the suspended sentence with the rehabilitative elements of the probation order.[94]

However, the straight use by the courts of the suspended sentence in preference to the probation order may result from a belief by sentencers that the deterrent element of future custody is a stronger intervention in the offender's propensity to re-offend rather than the likely efficacy of probation for the same offender. Additionally, the discretionary practices of the Probation Service not to re-enter cases before the court where breaches of the bond are manifest may dissuade sentencers from embarking upon a programme of formal rehabilitation. However, from a theoretical viewpoint, and assuming the automatic re-entry of probation cases where breach has occurred, an offender on a probation bond is equally open to the hazard of a custodial sentence upon breach. The essential difference between the probation route and the suspended sentence route is the unambiguous nature of the likely penalty where a suspended sentence has been given and is then activated, whereas in a case where the accused is placed on probation, the court might equally but finally dispose of the case by way of a fine, a custodial sentence or even a suspended sentence. This latter result would place the probation order on a sentencing level below that of the suspended sentence notwithstanding its conditionality. It is not uncommon to see probation orders disposed of in this way.

A second available alternative penalty which is very infrequently used is the conditional discharge under Section 1(1)(b) of the Probation of Offenders Act 1907 in the District Court. Such conditional discharge cannot be combined with a fine as the entire sentencing process is terminated by the discharge. Thus, it will be seen that the suspended sentence which is combined with a fine is a sentence which differs significantly in character to the conditional discharge. A suspended sentence combined with a fine, advances two elements, an element of desert provided for in the fine, together with a deterrent element

94 In chapter 7 we shall see how Section 99 of the Criminal Justice Act 2006 partially introduces this combined procedure.

which is reflected in the suspended term of custody.

The infrequency in the use of the disposal under Section 1(i)(b) of the Probation of Offenders Act 1907, may result from a reluctance on the part of sentencers to have sufficient confidence in the prosecution to recall cases for penalty in the event of further convictions by the offender. Moreover, the mere mention of the "Probation Act" in the District Court usually conjures up the idea of the unconditional discharge under section 1(i)[95].

In concrete terms, if upon finding the accused guilty of a subsequent offence the District Court enquires as to previous convictions, the detail of the record is such that the court cannot immediately know there and then if the case was disposed under Section 1(i)(a) or 1(i)(b) of the Probation of Offenders Act 1907. Usually a sentencer is merely told; "he got the probation act". This obviously is not a helpful recitation of the order made at a previous sitting of the court which, as courts of summary jurisdiction, require readily available information as to previous convictions when considering a new sentence. It is likely that such courts consider conditional discharges under the Probation Act as a different category of disposal when compared with a suspended sentence. Moreover, the number of cases of conditional discharge which are re-entered for further disposal is miniscule (Riordan 2000:40). This may in part result from the reluctance of the Prosecution to act on such breaches or may even result from a misapprehension as to the clear status of such orders on their part. Thomas (1979:244) highlights the availability of the probation order and the conditional discharge as those very sanctions which the court is bound to discount as non-custodial options before going on to consider a custodial sentence and then suspending it as provided for in *O'Keefe*.

> "If it (the suspended sentence) has any use in the system which is already equipped with probation and the conditional discharge, it is in relation to relatively serious

95 Section 1(i)

Where a person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either

(a) dismissing the information or charge: or

(b) discharging the offender conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called upon at ant time during such a period, not exceeding three years, as may be specified in the order. (Section 1, Probation of Offenders Act 1907)

> cases where the offence would normally attract a substantial sentence of imprisonment but quite exceptional mitigating circumstances justify a departure from normal practice." (Thomas 1974:688)

Bottoms (1981:20-21), utilising Ancel's critique of the suspended sentence (Ancel 1971), suggests that the suspended sentence offends against an essential principle of proportionality in classical jurisprudence. This theory presupposes that equal punishments are meted out for equal crimes. If a court follows the principles laid down in *O'Keefe* and *Mah Wing* then the conclusion must be that a determinate sentence of imprisonment is firstly appropriate and necessary in respect of the offender and the offence, otherwise a lesser penalty would be selected in preference to a custodial sentence. Thomas (1979) suggests that further consideration of the suspension of the sentence by the court is to take double account of mitigating factors already considered in fixing the original custodial penalty. By applying this critique, Bottoms (1981) suggests the court in suspending a term of imprisonment may be creating a greater disparity between the custodial and non-custodial sentence If the suspended sentence is to be reserved for very serious offences as Thomas (1974:688) suggests, the high frequency of use of the sanction in Ireland at present points either to a misapplication of the sanction as an avoidance of custody or more likely ,in quite a few cases, to a substitution for some form of conditional discharge. However the use of the suspended sentence as a surrogate conditional discharge allows the court to retain some degree of control over the procedures for breach which makes it more attractive to deploy. The use of the probation order and the conditional discharge may not, for a variety of reasons, particularly in relation to enforceability, attract the same appeal as the suspended sentence when the menu of possible disposals is considered by an Irish criminal court.

A common criticism of the suspended sentence is that it does not really amount to any punishment at all, as discussed above No monetary fine is extracted from the offender although such combination of fine and suspended sentence is indeed permissible. In Regina-v-King C.A.WLR, 12th June 1970, 1016, Lord Parker C.J., ruled that there was nothing in principle to prevent the imposition of a fine in addition to a suspended sentence. He stated:

> "Indeed in many cases it is quite a good thing to impose a find which adds a sting to what

might otherwise be thought by the prisoner to be a let off" Lord Parker 1017 (Ibid).

While a fine may be added to a suspended sentence, Wasik warns that a suspended sentence in the English statutory regime should not be added to a fine (Wasik 2001:162). The power of an Irish sentencing court to impose a fine in addition to a suspended sentence is derived from the power to impose a fine and imprisonment concomitantly where this is provided for in any penalty provision The general practice is not to impose a fine with the suspended sentence in Ireland. Thus, as a result of this practice a suspended sentence may be seen in some respects as occupying a place below that of the monetary fine.

Although Ashworth (2002) reports the suspended sentence is considered a "let off" by some offenders, O'Malley considers "it is real punishment both for the stigma that it carries - a term of imprisonment and the possibility that it may be activated for breach of condition" (O'Malley 2000:292.) Bottoms (1981:21) quoting from the debate on the part suspended sentence in the Parliament at Westminster in 1976-1977 identified the "all or nothing" nature of the sanction where heretofore it was permissible to suspend only the entirety of the sentence and not part thereof. Mr Patrick Mayhew considered the issue thus:

> "The defect (with a suspended sentence) was and is that the majority of people who received a suspended sentence reckoned that they had got away with it. The defect was that the whole sentence had to be suspended, or none of it. Human nature being what it is, there is a strong tendency for the offender to say 'I do not have to go to prison at all, I've got clean away'… one cannot make any punishment go with it". (Mr Patrick Mayhew, H.C. Committee Deb., Standing Committee, E., Session)

Depending upon the circumstances of the convicted person and his or her likelihood of re-offending, the suspended sentence may present as either a "let-off" with a judicial reprimand or else a serious instrument of coercion. For example, a person convicted of a serious fraud offence may obtain a suspended sentence if s/he did not have a previous conviction and the court was persuaded that s/he would be unlikely to re-offend again. Indeed the suspended sentence is a common disposition for such white collar crime. But in the example given, is the stigma of receiving a suspended sentence and the endurance of its suspension (O'Malley 2000:292) a punishment which exceeds the imposition of a heavy

fine or an order for community service? Where is the extraction of punishment for wrongs done evident in such a suspended sentence if all that is required is that the offender merely keep the peace and be of good behaviour? It is not unknown for Irish sentencing courts to take account of compensation paid to victims for injury and monetary loss. The payment of civil penalties in advance of sentence may be taken into account when deciding upon the cumulative sum of penalties (People (DPP – v – Redmond [2001] 3 IR 390). In the case of many white collar criminal offences the payment of compensation in advance may provide the tipping point between a custodial and a suspended sentence.

As noted, the Irish judges tend to locate the suspended sentence in the overall scheme of sentencing very close to the actual custodial sentence where particular emphasis is placed upon the issues of avoiding custodial sentences and deterring offenders from committing further offences. The high status ascribed to the sanction however may not be reciprocated by offenders themselves. Additionally, public perceptions of the sanction may not concur with this elevated position of the sanction. While the perceptions of offenders and the public on this issue have not been surveyed in Ireland, consistent findings from other common law jurisdictions would appear to challenge the view that the suspended sentence finds its natural place or may be located anywhere near the upper end of the sentencing scale .

Studies elsewhere of offender and public perceptions of the suspended sentence have tended to locate the sanction at very low levels in the scale of penalty and severity. Sanctions which are immediate and demanding such as the custodial sentence or the payment of a fine are perceived to be more severe than the suspended sentence which is frequently regarded as a non-demanding sanction. Indeed, in many of the studies, even a conditional discharge with probation was perceived to be higher up on the severity scale (Walker and Marsh 1984:27, Karpadis and Farrington 1981:107, Edney and Bagaric 2007:357). The immediacy of any punishment appears to be the defining characteristic for the purpose of scaling the penalty. Because the suspended sentence is attenuated and contingent, it appears to recede rapidly down the scale of severity in the view of the public. There is no reason to believe that offenders in Ireland do not ascribe the same placement for the suspended sentence as do the general public in these studies.

As previously noted in the discussion on the rationales for the sanction, O` Malley claims

that the suspended sentence contains two elements of punishment which relate to the possibility of activation and the endurance of such a risk of activation. Thus the suspended sentence is seen in this scenario as something closely allied to the custodial sentence. But it could equally be argued that the risk of a custodial sentence for the commission of offences is a burden that each citizen is called upon to bear. By approaching the issue of risk from the perspective of the compliant citizen, Edney and Bagaric (2007) demonstrate that there is no greater burden placed upon the person given a suspended sentence than that which is placed upon the compliant citizen. Everyone is at risk of a custodial sentence if they commit an offence punishable by imprisonment, but it is erroneous to claim that everyone is thus undergoing some type of criminal punishment (2007:355). Accordingly they conclude that the suspended sentence does not comprise a punitive measure at all since the risk of imprisonment is contingent upon the commission of a further offence and not a past offence. The nature of the risk is similar for all alike. What may differ however, is the degree of risk attached to the person under a suspended sentence (Edney and Bagaric 2007:356). But if the suspended sentence is seen to be devoid of this penal component, how is the suspended sentence, a sentence upon conviction, to be regarded as a punishment at all? Is the suspended sentence serving some other function perhaps not connected immediately to penalty but which may relate instead to matters which are primarily issues of criminal policy such as crime control? A similar criticism of the suspended sentence was raised in England in the Home Office white paper (1990) where it was stated:

> "Many offenders see a suspended sentence as being a 'let off' since it places no restrictions other than the obligation not to re-offend again. If they complete the sentence satisfactorily, all they have felt is the denunciation of the conviction and sentence, any subsequent publicity and, of course, the impact of acquiring a criminal record" (White Paper: Crime Justice and Protecting the Public (1990:320).

The claim that the suspended sentence in Ireland finds its natural position just below the custodial sentence is open to challenge when one considers the empirical research conducted in other jurisdictions. As noted, one Irish respondent (A8J1SC) specifically referred to the common perception among offenders that a suspended sentence is a "let off" where no punitive element is demanded of the offender and no greater demand is made of him/her than is made of any citizen simply to obey the law. However a record of

a custodial sentence albeit suspended may have long term consequences for the offender who is given a suspended sentence for reasons relating to travel visas and future employment (A2J1DC). In this scenario the offender is marked out by being denounced by the court without the extraction of any immediate penalty.

The main criticism of the denunciatory approach is that while initially it may appear efficacious it fails to adequately consider the response of the general public to whom it is primarily addressed. One cannot be denounced in a vacuum, it is necessary to consider also the audience to whom one is denounced. The denunciatory approach was considered by Walker and Marsh (1984) in Britain where on a survey of public responses to sentences the authors concluded:

> "The denunciatory theory has the attraction of appearing to justify a tough sentencing policy in a way which is independent of "just deserts" or a belief in general deterrence, but the empirical facts make it most unlikely that the theory is realistic" (Walker and Marsh 1984:41).

Moreover, this finding is reinforced by studies of attitudes on the suspended sentence. Where offenders are concerned, Edney and Bagaric claim that "…few are deceived by the superficial punitive veneer of the suspended sentence" (Edney and Bagaric 2007:356).

Sebba and Nathan report that:

> "a suspended sentence involving the prospect of a possible prison sentence for a specified time is less burdensome than the immediate inconvenience of probation supervision or a financial penalty (Sebba and Nathan 1984:231).

An earlier survey by Sebba disclosed that a $250.00 fine was considered more severe than 6 months of a suspended sentence by offenders (Sebba 1978:247).

Besides the issues which emerge in the scaling of the sentence above, whether viewed through the prism of the sentencer, the offender or the general public, once a fixed position is ascribed to the suspended sentence it is possible to observe another phenomenon associated with the operation of the sanction. This relates to the tendency of some courts to utilise the suspended sentence as if unfettered by considerations which

would apply if an actual custodial sentence was contemplated at the time of the passing of the sentence. Osborough (1982) has referred to the tendency of Irish sentencers to use the sanction with " gay abandon " without such constraints. The criticism that the courts may tend to inflate the sentence by increasing the custodial period merely because it is to be suspended or indeed the application of the suspended sentence to offenders who *ceteris paribus*, would not otherwise have received a a suspended sentence, must be grounded upon the premise that suspended sentences are located just below the custodial sentence and were genuinely intended to be used as a direct substitute for such custodial sentences. If this premise does not hold, it is difficult to determine the inflationary or netwidening effect of the sanction. Therefore for the following discussion it will be assumed for the purpose of argument that the suspended sentence in Ireland is always made as a direct substitute for an immediately contemplated custodial sentence.

It has been observed (Ryan and Magee 1983:401) that courts when imposing a suspended sentence, may impose a more severe suspended sentence than would otherwise be the case if immediate custody had been imposed. This tendency to increase both the custodial part of the suspended sentence and to elongate the period of suspension has already been identified as an inflationary feature in the use of the suspended sentence. O'Malley has cautioned against the inclusion of such a premium in the sentence as follows:

> "It cannot be too strongly emphasised that a sentence of imprisonment should not be increased simply because it is about to be suspended. As the English Court of Appeal has frequently said, the judge should first decide on the appropriate custodial sentence, impose it, and then decide if it should be suspended. *A fortiori*, a suspended sentence should never be imposed if a non-custodial sentence such as a fine or deferred supervision would suffice. After all the recipient of a suspended sentence who breaches one of the conditions may be ordered to serve the full term originally imposed. It would be unjust if that term were disproportionate to the gravity of the offence. It would also be a waste of public resources in view of the cost of imprisonment". (O'Malley 2000:292)

Notwithstanding the unambiguous endorsement of the *O'Keefe* and *Mah Wing* principles by this leading Irish writer, there is no clear adoption of these principles within the Irish case law which is surprising in light of the fundamental principle at issue. It could be argued that an Irish criminal court may make a suspended sentence in circumstances where the custodial sentence may not have been in immediate contemplation by the sentencer.

Sparks' identification of the "malfunction" of the principle may be observed in the Irish Criminal Courts practice to impose a longer suspended sentence than would have been the case if an immediate custodial sentence had been imposed if at all. (Osborough: 1982, Sparks: 1971, Ryan and Magee: 1983).

Some of the judges interviewed gave direct evidence of this tendency to fashion a suspended sentence in a manner less restrictively than that prescribed in the English case law and advised by Irish academic writers. O'Malley has identified the custodial sentence imposed which is then suspended and the period of suspension itself as two distinct elements of punishment (O'Malley 2006:457). However, the issue of equivalence appears to present a dilemma for the Irish sentencer when she/he is passing sentence by way of a suspended sentence. In answer to this dichotomy, the judges below appear to construct longer periods of custody which are then suspended together with longer periods of suspension of the sentence itself. The fact that the offender is not entering custody immediately appears to invest their sentencing with a wider discretion than would be the case if an immediate custodial sentence was imposed :

> "Another way that I would approach it too is I'd often consider extending the suspended sentence aspect of the matters to the maximum available. Let me explain it more clearly. Say for instance, you might have a person on his fourth or fifth conviction for no insurance, on a plea of guilty in appropriate circumstances, I might give him credit for the plea, impose a sentence of four months. If I considered a suspended sentence appropriate in the circumstances, I might give the sentence for six months, suspend it for a period of twelve months on him entering a bond." A6J1DC

> "There is no comparison between a suspended sentence and the custodial sentence. There is no comparison….they (offenders) are there in court: the question is are they getting out there and then."A7J2CC

> "...very often if I am imposing a suspended sentence, and if it is a border line you know as whether he would get a prison sentence or a suspended sentence with conditions, I would say very clearly I am giving you a suspended sentence but I am putting a sting in the tail and I might add an extra year on but suspend it to keep it hanging over his head. So that he knows if he is getting his liberty, its coming at a price."A7J3CC

It could be argued that such an approach offends against a fundamental principle of proportionality (People (D.P.P.) –v- McCormack supra, People (D.P.P.) – v – M supra)

and this would clearly be the case if the offender was breached and required to serve the full term thus suspended. However it could be argued that the conditional suspension of the sentence may be "set off" against the obligation to serve the original sentence albeit a longer sentence. In the circumstances the principle of proportionality while ostensibly breached by the imposition of a longer custodial sentence is observed in a quasi- contract between the offender and the court.[96]

Thus, the judges look to the responsibilisation of the offender as an integral feature of the sentence. A sentence structured in this way, albeit with an extra custodial premium attached, is the price that some judges demand of the offender if the sentence is to be suspended. A number of studies from other common law jurisdictions confirm the tendency of sentencers to increase the sentence merely because it is to be suspended. But the inflationary feature is not the only aspect which is observed in these studies. A concomitant tendency by sentencers to reach down the sentencing scale and to expose the offender to a penalty just short of the custodial sentence has been reported in a series of studies (Bottoms1981:5, Sparks1971:392,Tait199:143,Moxon1988:68)[97] .

The use of the sanction primarily as a special deterrent is likely to increase the probability that the avoidance of prison becomes a secondary consideration and hence the sanction may well displace other non-custodial sentencing dispositions, a phenomena identified by Oatham and Simon in their review of the 1967 English legislation (1972).[98] Indeed,

96 Irish sentencing courts probably apply the suspended sentence in circumstances where frequently the real custodial sentence would not have been contemplated but do so in the sense of applying a bargain or a contract whereby the defendant may regard the penalty effectively as a "let-off" (Ashworth 2002:1103) thereby avoiding further punishment, unless breached. The courts may be applying an actuarial approach in such circumstances by imposing a more severe penalty for the original offence on the contingency that the convicted person will not be called upon to serve such penalty and if he is so called upon, the penalty with an additional premium attached is then warranted.

97 Instead of reducing the prison population by the use of diversionary sanctions such as the suspended sentence, sentencers made less use of the fine and probation bond and elevated a number of those previously given such penalties to a higher risk of incarceration by placing those offenders on a suspended sentence (Bottoms 1981:5). This net widening effect was separately observed in England and Wales by Sparks (1971) and in Victoria by Tait (1995). In England, sentencers particularly magistrates, tended to increase the custodial sentence before they would then suspend it thus inflating the sentence to a higher level of custody when in the event such a sentence was activated upon breach (Bottoms 1981:6, Moxon 1988:68). In Victoria, Tait (1995:143) estimated that only about 50% of offenders were diverted from custody when given a suspended sentence. The remaining 50% given such a sentence would not otherwise have received a suspended sentence but would previously have received a fine or probation, signifying penalty escalation. Moreover, when a person was given a suspended sentence Tait estimated that the sentence was increased by about 50% in Magistrates Courts where previously a 4 month custodial sentence was increased to 6 months imprisonment and then suspended (Tait 1994). The dual effect of increasing the custodial sentence before suspending it (inflation) and elevating at least 50% of the cohort to a custodial sentence (net widening) resulted in a lagged increase in the prison population in England and Wales (Sparks 1971).

98The development of the suspended sentence in England and Wales is instructive to the reader for one further reason. As noted in chapter three, the community service order in Irish law is expressly a penalty which should only be imposed if a custodial sentence is in immediate contemplation by the sentencer, whereas the community service order in England and Wales, as it developed over the decades, has essentially remained a sanction which can be made where the offence is "an imprisonable offence" but the alternative penalty otherwise might equally be a fine or probation in that jurisdiction. These sentencing structures are somewhat reversed when the suspended sentence is examined. In England and Wales the suspended sentence should only be applied after the Criminal Justice Act 1973 where, but for the Act, a custodial penalty would otherwise be imposed, while in the Irish jurisdiction, despite academic exhortations, there is no express requirement on the Irish sentencer to decide upon an immediate custodial sentence before going on to consider whether to suspend such sentence or not.

without the establishment of a clear governing principle that the use of the suspended sentence in Ireland should proceed primarily as an avoidance of custody, it is more likely than not that the use of the suspended sentence particularly in the lower courts may operate to increase the real risk of a custodial sentence upon breach which eventual outcome would not have been in contemplation at the original sentencing trial . The clear danger to the offender in these circumstances is that s/he, if breached and the sentence is activated, is required to enter custody for an offence which the court initially may not actually have intended. Moreover, the tendency to give longer sentences and then to suspend them may further endanger the offender not only to custody but for a longer period of time than might have been contemplated if immediate custody was imposed.

However it is important to keep in mind that even where a breach of the suspended sentence is committed, the likelihood that the offender will ever have to answer for such breach is quite slim due to structural failures within the criminal justice system to detect such breaches or to seek activation of sentences which are suspended[99]. Moreover the judges are aware of the low probability that such transgressions will ever come to the attention of the court. Thus the original decision to impose a suspended sentence, albeit where no intention existed to impose a custodial sentence initially, is seen to be mediated by the consideration that the sentence may never be invoked as a custodial sentence.

In summary, it is clear that the experience of sentencing inflation in other jurisdictions is also present in the use of the suspended sentence in Ireland. Moreover, the sanction is probably used more extensively in lieu of other sanctions which results in a manifestation of netwidening in respect of the sanction.

CONCLUSION

In this chapter the second sanction identified in this study as an alternative to the custodial sentence, namely the suspended sentence, was introduced.

The origins of the suspended sentence in Ireland were examined by drawing comparisons with the use of the sanction in other jurisdictions and in particular with the jurisdiction of

99 This issue is discussed more fully in the next chapter.

England and Wales. A practice of imposing or recording a custodial sentence upon conviction was developed in the early years of the twentieth century by judges of the old Irish High Court when exercising criminal jurisdiction in indictable matters. This practice continued in both parts of Ireland after 1920 but the use of the suspended sentence was limited to the High Court and County Courts in Northern Ireland whereas the penalty became widely used in all levels of jurisdiction in the Irish Free State and continues to be so used to the present day.

Whatever about its obscure origins, the suspended sentence in Ireland has emerged as one of the major dispositions utilised by sentencers. Unlike other common law jurisdictions where the suspended sentence was purposefully designed in a statutory format, to act as a decarcerative device, no such limiting function can be clearly identified for the suspended sentence in Ireland. Although leading Irish academics advise against the use of the sanction in a manner inconsistent with the aim of avoiding a custodial sentence, Irish sentencers appear to utilise the sanction for a number of purposes which may not be directly connected to such a fixed and primary purpose. In particular, the intention by judges to change the future behaviour of the offender by the threat of a custodial sentence points to a special affinity on their part to the aim of special deterrence as the primary purpose of the sanction. Ultimately such an approach by sentencers might be criticised on the basis that it does not sufficiently answer penological aims in sentencing, but is seeking to answer instead issues of criminal policy which are not necessarily the concern of the judiciary.

As noted, the Irish suspended sentence developed from an assumed inherent jurisdiction of the sentencing courts. The suspended sentences referred to in the literature from other jurisdictions, including common law jurisdictions, were formulated on a statutory basis. But even where such statutory forms of suspended sentence specified that such a sanction should only be used as an alternative to custody, the research shows a tendency of judges in those jurisdictions also to deviate from such a prescriptive regime and to import deterrent aims into their sentencing. From the replies by the Irish judges, it is difficult to come to the conclusion that in almost every case which they spoke of a custodial sentence would in fact have resulted if the option of substituting the penalty with a suspended sentence had not been available. Clearly the respondents adverted to the proximity of the custodial option when they spoke of the suspended sentence. But would the custodial

sentence have inevitably followed in the absence of the suspended sentence? If somebody is considered to be in need of rehabilitation or deterrence, would the placement of such offender on probation with conditions for rehabilitation over a prescribed period not equally answer? There is no reason to expect that the suspended sentence developed in Ireland on a common law basis is any more resistant to the tendency experienced in other jurisdictions, where the sanction is better defined and provided for in legislation, to uplift an offender into a higher category of sentence. As noted, this net widening effect was a constant feature of the suspended sentence in England and Wales and Victoria where almost 50% of offenders were exposed to a higher level of sanction due to the mere availability of the sentence to judges. Admittedly, the remaining 50% were genuinely diverted from custodial sentences but the overall effect of decarceration was mitigated by a lagged increase in the prison population due to later activations upon breach. These activations, of necessity, included a certain amount of offenders who were originally assigned a suspended sentence incorrectly.

But how might one compare the Irish suspended sentence, which emerged from a Judge-made matrix of considerations with the type of analysis done by Sparks? At a formal level, all suspended sentences in Ireland are real prison sentences which are then conditionally suspended and accordingly at this formal level may be characterised as sentences which avoid the imposition of custody. However, as the penalty developed in Ireland and extended to all levels of courts for the disposal of the most serious to the very minor of offences, a *sub rosa* objective for the penalty may also be seen to emerge beneath the formal sentence of imprisonment. When this hidden objective is disclosed, control of the future behaviour of the convicted person may be seen to predominate over any real concerns about unnecessary incarceration. If this latter analysis is correct, the courts, instead of imposing sentences in such a way as to purposefully avoid the imposition of custody as a primary objective, are using the threat of custody, whether real or otherwise to enforce good behaviour on the convicted person.

It is argued that in many cases, especially in the lower criminal courts, the threat of the custodial sentence is the intended sentence and not the actual custodial sentence itself. The basis of this claim is founded in part upon the observation that prosecutors rarely apply where grounds clearly exist to have the suspended sentence activated and courts

generally are reluctant to activate sentences when asked to do so or may vary the penalty to avoid the full severity of the original sentence.

As noted, the Irish judges tend to allow an inflation of the sentence by extending the custodial period to be served which is then suspended for perhaps a longer period. Contrary to O'Malley's estimation of the dual punitive effect of both the sentence and the period of suspension, the Irish judges, the writer has argued, attach a premium to the sentence because it is to be suspended. Such premium of penalty acquires, it is argued, a quasi contractual character where the court is prepared to forego the extraction of punishment in exchange for a bond entered into freely and in good faith by the offender to keep the peace, be of good behaviour and abide by whatever extra conditions may be specified. In the event of breach, some judges stated that the full "price" will then be extracted.

While the rationale for the Irish suspended sentence has proved difficult to locate, it has been argued here that the primary function of the sanction is to seek to control the future conduct of the convicted person rather than to avoid sending such person into immediate custody. Although these two issues are clearly related, the controlling function of the sentence is the salient characteristic in the disposal.

The controlling function is readily identified in the conditions which are attached to the bond or recited in the spoken order as the case may be. Moreover, the consent of the convicted person to abide by the conditions attached to his/her bond whether they seek to limit his/her criminogenic tendencies or to promote an individualised therapeutic intervention, suggest an agreement between the court and the offender that endeavours to change or control his/her behaviour. While such conditions may be intended to interrupt the offender's criminal lifestyle, they should not be so onerous as to break the principle of proportionality.

The literature discloses that judges who are invested with the jurisdiction to impose suspended sentences tend to utilise the sanction both as a decarcerative measure and also as an instrument in criminal policy to lessen the incidents of crime. A certain flexibility is assumed by judges when they make suspended sentences which would not be the case when an immediate custodial sentence is to be imposed. This may result in both a

widening of the cohort of those exposed to a custodial sentence (net widening) and a tendency to increase the penalty on the assumption that it may never be served (inflation). Underpinning all of this is what might be described as the "leitmotiv" of deterrent sentencing. There is an uncritical assumption that offenders approach the costs and benefits of compliance with a suspended sentence in much the same way as sentencers themselves approach decisions in their everyday lives. But, the literature discloses, offenders on suspended sentences frequently breach their bonds and do not have their sentences activated. What is remarkable is the tendency of sentencers, whether operating under statutory regimes, or when left to their own devices as in Ireland, to converge towards similar patterns of usage of the suspended sentence. In a large number of cases, lesser sanctions such as the fine are abandoned in favour of more severe penalties. Conditional discharges, whether with or without probation supervision, are similarly discounted in favour of the suspended sentence.

It is hypothesised that the disinclination of Irish sentencers to use the above mentioned dispositions is in part founded upon a lack of trust that cases will be dealt with by the relevant agencies either the Probation Service or the Prosecution with sufficient attention so as to make the particular disposition worthwhile and effective. The suspended sentence in this context presents as a penalty to fill the gap between a custodial and a community based sanction.

The persistence by sentencers both in Ireland and elsewhere to invest the suspended sentence with the purpose of deterrence, the efficacy of which appears to be demonstrably absent, speaks more of the judges' sense of hope that the offender will remain true to his/her bond or contract entered into than anything else. If the offender is to remain compliant, crime may decrease and society in general may benefit. However it is difficult to reconcile the high status afforded to the suspended sentence when it is claimed to be an alternative to a custodial sentence with the perceptions by offenders and indeed by the general public, as is evident from the research and from one respondent in this study, that the suspended sentence amounts to a "let off".

In contrast with the English experience of the controlled use of the suspended sentence, Irish sentencers have fashioned the use of the suspended sentence "in a mood of gay

abandon" claims Osborough (1982:256). But the prospect of regulating the suspended sentence in Ireland in the context of a statutorily prescribed sentence raises the interesting possibility of judicial resistance to what has heretofore been regarded as a common law authority to impose such a sentence and in a manner where Irish sentencers have exercised wide discretion in the fashioning and execution of such sanctions. The regulation of the suspended sentence in Ireland by statutory prescription might well launch the suspended sentence on the same legislative trajectory as the suspended sentence in England and Wales over time, eventually leading to its near extinction. This, of course, presupposes the courts relinquishing any assumed common law power which has been "long recognised" (O'Dalaigh C.J., McIllhagga The Supreme Court 29th July, 1971). The distinct difficulty presents when seeking to change an already established sentencing practice; that sentencers are resistant to adjusting their approach to sentencing on the passage of legislative measures to effect such adjustments (Ashworth 1977, Thomas 1974, Young 1979) and are particularly resistant to such changes when the sentencing practice is firmly established and developed within a judicial setting.[100]

Thus far, the arrival of the suspended sentence and its ambivalent use has been discussed. To achieve a fuller understanding of the suspended sentence, particularly as it operates in Ireland, the sanction must be examined in greater detail. While a theoretical discussion on the sanction may advance our knowledge of it, to a certain point, it is not possible to fully understand the sanction until it is seen in operation. In the following chapter, and in chapter 7, the operation of the suspended sentence in Ireland is more fully explored.

100 A striking example of judicial resistance to legislative measures which seek to direct the hand of the sentencer present when one analyses the practice of the Circuit Criminal Court when disposing of cases under Section 15(a) of the Misuse of Drugs Act, 1977 as amended. While the political and policy intention behind the introduction of the section was to make drug dealing a highly undesirable pursuit for the offender on a cost benefit basis, the Courts invariably apply the "special and exceptional circumstances" clause in the section. This resulted in the reduction of what was intended as a presumptive minimum ten year sentence of imprisonment being reduced to approximately six and a half years imprisonment in almost all cases (Kilcommins et al 2004).

CHAPTER 6

THE SUSPENDED SENTENCE IN IRELAND

INTRODUCTION

Unlike the development of the suspended sentence in other jurisdictions where the sanction developed in a statutory format and is thus subject to statutory interpretation, the suspended sentence in Ireland developed as a common law sentencing procedure only. The sanction was wholly defined and obtained its meaning from practices and interpretations of the Judges who used the sanction. In the previous chapter, the historical development of the suspended sentence was discussed in conjunction with an analysis of the rationale of the sentence. In this chapter, the distinctly Irish form of the sanction will be discussed in detail to demonstrate how a sentence, which developed solely within a judicial construction, has been used to meet changing exigencies that present to the Irish sentencing courts. In response to such exigencies, the courts developed variations of the suspended sentence and even the part suspended sentence so that over time four distinct variations of the suspended sentence emerged. The statutory suspended sentence enacted by the Oireachtas will be discussed in detail in Chapter 7.[101]

The types of suspended sentence developed by the courts comprise the following: the straightforward suspended sentence, the reviewable sentence or Butler Order, the part suspended sentence, and the variation used in the District Court where a warrant of execution for a term of custody is withheld for a defined period of time on condition that the offender is not further convicted within that period.

The chapter then proceeds with an analysis of the ingredients of the sentence with particular reference to the time elements of the sanction and the centrality of the conditional nature of the suspension. The practical application of part suspended sentences are further examined to determine whether they offend against constitutional provisions in relation to the separation of powers and statutory provisions in relation to the remission of sentences.

101 Section 99 Criminal Justice Act as passed by both houses of the Oireachtas and signed into law by the President 16th of July, 2006. S.I. 390/2006 brought section into force on 2nd October 2006.

The activation of the sentence is next discussed to explore the element of discretion in the commencement of activation proceedings and the actual activation of sentence. Critically, the role of the prosecution in the supervision of the conditional element of the sanction is examined in combination with the function of initiating proceedings for activation. The chapter further explores the parameters of the discretionary role of the court in the activation of the suspended sentence, against claims that the sentence is self activating in the event of breach of conditions.

Finally, the chapter concludes with a reflection upon the workings of the suspended sentence in Ireland, the adaptability of the Judiciary to advance sometimes conflicting aims in sentencing and a discussion on the hidden purpose of the sanction.

THE VARIETIES OF SUSPENDED SENTENCE IN IRELAND

Besides the statutory form of suspended sentence provided for under Section 99 of the Criminal Justice Act 2006 the criminal courts in Ireland have utilised in varying degrees four varieties of suspended sentence. These comprise the straightforward suspended sentence, the part suspended sentence, the suspension of a partially served custodial sentence upon review by the court (Butler Order) and the suspended sentence conditional upon the convicted person not receiving a further conviction within a specified period.

The suspended sentence continued to be developed in the Irish criminal courts in a manner unregulated by statute and consequently this partially resulted in the fragmentation of the use of the disposition.

(A) The Straightforward Suspended Sentence

The straightforward suspended sentence commonly used in the criminal courts in Ireland is structured as follows. The sentencing court pronounces a custodial sentence upon a convicted person for a specified period of time (the custodial period). Immediately, the court then suspends the operation of the sentence by specifying two matters. Firstly, the suspension of the custodial sentence will only become operative provided the convicted person forthwith enters a bond to keep the peace and to be of good behaviour but the court may also attach further conditions. The second specification in the order is that the custodial sentence shall continue to be subject to activation for a specified period of time (the operative period or period of suspension).

(B) The Part-Suspended Sentence

In the latter quarter of the twentieth century, the Judges of the Central and Circuit Criminal Courts developed a variation of the wholly suspended sentence. This practice was to evolve further into two distinct sentencing approaches, but common to both was the requirement that the convicted person should firstly undergo a period of incarceration before release into the community, where a further period of imprisonment would remain suspended over him/her for a fixed period of time.

The part-suspended sentence which evolved in Ireland came into prominence in the Circuit Criminal Court against a background of prison overcrowding and the early release of prisoners. It was not uncommon in the 1980s to have a convicted person sentenced to three years imprisonment, and released on temporary release within weeks of being convicted and sentenced. O'Malley has identified the extended use by the Circuit and Central Criminal Courts of the part-suspended sentence as a judicial counter measure to the frequent release of prisoners under these circumstances (O'Malley 2006:464). The Central and Circuit Criminal Courts endeavoured to ensure the convicted person served at least a minimum period of his/her custodial sentence actually in custody.

The frequency of the early release of prisoners prompted a judicial response which might in retrospect be seen as an attempt by the Judiciary to wrest from the Executive the administration of a punishment which is clearly an Executive function (People (DPP) –v- Finn [2001] 2IR 25). The extent to which these judicial responses endure are explored in the empirical work of this study, but for now, it is sufficient to map out how these practices have developed over time and were scrutinised by the Superior Courts.

(B1) Reviewable Sentences

The first type of part-suspended sentence was developed by Butler J. in the Central Criminal Court, when sentencing the accused he set out the following in his order:

> "I impose a sentence of seven years penal servitude. And I direct as follows:-
>
> That if and when you have completed thirty six months of that sentence, dating from to-day, if you have completed thirty six months from to-day and have complied with prison discipline in obeying the prison rules that would, in the

> normal way, allow you leniency, I will then suspend the balance of your sentence, on your entering into a Bond in your own bail of £500.00, to keep the peace for the remaining four years of the sentence". (Butler J. *Ipsissima verba).* (The State (Woods) –v- A.G. [1969] I.R. 385).

This part-suspended sentence survived a constitutional challenge by the Applicant on the grounds that the Supreme Court construed the order as reserving unto the court itself and not to the Executive two essential features which indicated the court retained seisin of the matter: firstly, whether the prisoner complied with prison discipline; and, secondly whether the court having determined he had so complied, should then suspend the remainder of the sentence. This type of part-suspended sentence became known as a "Butler Order" (Osborough 1982).[102]

Thus, the "Butler Order" or review of sentence remained as the quaint phrase has it "in the bosom of the court" and it was not subject to executive "interference" by the early release of the prisoner. The essential feature of this procedure was the review of behaviour of the prisoner which the court reserved to itself. Usually, good behaviour in custody required the prisoner to remain drug free while in prison and this was normally confirmed if the prisoner was housed in the Training Unit within Mountjoy Prison, the only open "drug free" area of that penal establishment. By adopting this review procedure, the court was in a position to calculate, to some degree, the element of risk of future criminal behaviour of the prisoner where drug use was identified as a significant factor in the offender's previous criminal activity.

Once again we may glimpse the rationale of the Irish suspended sentence in this procedure. The sentence, while utilising the formal imposition of a term of imprisonment for the remainder of the sentence and then suspending it for the same period, has one express purpose in mind and that is to control the future behaviour of the offender and not necessarily the extraction of further retribution from him/her.

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102 The essential difference between a part suspended sentence and a Butler Order or reviewable sentence is that the court is functus officio once it pronounces the sentence in the former sentence while the court is not functus offico but retains seisin of the sentencing function in the latter. However, the reviewable sentence does not hold the same degree of certainty for the convicted person serving a custodial sentence until the court actually suspends the remaining part of the sentence at review. The court might equally not suspend the remaining part of the sentence upon review, although such would be unusual unless the prisoner failed to comply with the conditions set for compliance. Nonetheless, a degree of uncertainty endures until the court finally suspends the remainder of the sentence of imprisonment in the Butler Order procedure.

"Butler Orders", as noted, require the review of the sentence of imprisonment before the remainder of the sentence may be suspended. This review procedure survived the challenge to its validity in the case of People (D.P.P.) –v- Aylmer [1995] 2 ILRM 624. In the instant case, the appellant to the Supreme Court challenged the validity of his detention on the basis that the President of the High Court, sitting in the Central Criminal Court upon revoking a suspended sentence made by Butler J. (who had died in the meantime) had exceeded his powers, as had the original sentencing Judge, Mr. Justice Butler. The appellant claimed that the sentencing court had acted unconstitutionally by interfering with the Executive's sole power to commute sentences pursuant to Article 13.6 of the Constitution of Ireland 1937. This argument turned upon the appellant's contention that Butler J. was exercising a function of commutation of sentence in reviewing a sentence after the appellant had served a certain portion of a custodial sentence, namely thirty six months in custody of an overall sentence of ten years imprisonment. The appellant failed in his application when a unanimous Supreme Court declared that the sentencing court in reviewing a sentence in this manner had not finalised the sentence and clearly retained seisin of the sentencing issue.

McCarthy J. in the Supreme Court stated:

> "If, as I conceive it to be, the two considerations in the instant appeal is the validity, as distinct from the desirability, of the form of Order made by Butler J., then, in my judgement, the appellant's challenge cannot be defeated by any form of estoppel (p.638).

And he further stated:

> "Insofar as this case turns upon a like consideration, I am of opinion that there was no invalidity to the sentence imposed by Butler J. As to its desirability, I think it would be invidious for me to express any view of intended general application in a sentencing matter. I would not wish to circumscribe the judicial power in its application to the circumstances of a particular case" (People (D.P.P.) –v- Aylmer [1995] 2 ILRM McCarthy J. p639).

Thus, in Aylmer's case the Supreme Court refused to countenance the procedure adopted by Butler J. of the reviewable sentence as invalid. Provided the sentencing court retained seisin of the sentencing issue when reviewing a custodial sentence in the manner of a Butler Order, the court remained within jurisdiction. A different situation might arise if a

court had made no mention at the sentencing stage of any intended review of the custodial sentence, but of its own motion or without warning or notice to anybody, called back to court a sentenced person for review of sentence. In the latter scenario, the court would clearly be *functus officio* and without jurisdiction. Such a procedure would clearly offend against Article 13 (6) of the Constitution of Ireland, 1937.

In the case of People (D.P.P.) –v- Finn [2001] 2 IR25 the Supreme Court, when addressing the issue of time limits within which the prosecution was obliged to lodge a Notice of Appeal against sentence, also took the opportunity to comment on the status of the Butler Order or reviewable sentence.[103]

Keane C.J., speaking *obiter*, expressed the view of the court that the sentencing Judge's final order on the review date was, in all but name, the exercise of the power of commutation or remission of sentence reserved under Article 13.6 of the Constitution of Ireland, 1937 in the remit of the President which makes provision for the power to be conferred by law on other authorities. Such delegation of power of commutation or remission is specifically provided for under the Criminal Justice Act, 1951. Sec 23(1) empowers the Government to commute or remit in whole or in part any punishment except in capital cases. Sec 23 (3) ostensibly provided a mechanism to allow the Government to delegate such powers to the Minister for Justice. The Chief Justice concluded that the practice of reviewing sentences was accordingly undesirable and should be discontinued.[104] Keane C.J. while acknowledging that this particular aspect of the judgment was *obiter* stated that:

> "the remission power, despite its essentially judicial character, once vested under the Constitution in an executive organ, cannot, without further legislative intervention, be exercised by the courts" (People (DPP) –v- Finn 2 IR 45-46).

Walsh's analysis of this important case leads him to conclude that "for the Courts to suspend the sentence when it came up for review on a "Butler Order" is in effect an

103 Section 2(1) of the Criminal Justice Act, 1993. The Supreme Court held that the D.P.P. was strictly obliged to bring his Appeal within twenty eight days of the original sentence and not from the review date when the remainder of the sentence was suspended. Under Section 23 Criminal Justice Act 2006 this period can be extended to 56 days.

104 Such a pronouncement from the Supreme Court approximates to a sentencing guideline for the Criminal Courts, although it is important to emphasise that there is no formal sentencing guideline procedure in Ireland and the Superior Courts have avoided such a procedure (People (D.P.P.) –v- Tiernan [1988] I.R. 250, [1989] I.L.R.M. 149).

unlawful encroachment upon the Executive power… [t]he clear message is that the Supreme Court in *Finn* considered Butler Orders to be invalid" (Walsh 2002:1035).

In an earlier case of O'Brien –v- Governor of Limerick Prison [1997] 2 I.L.R.M. O'Flaherty J. gave tacit approval to the procedure adopted by Butler J. when he stated:

> "If the learned trial Judge had used a formula, such as that which had been used by Butler J. and which would have made clear that he was retaining seisin of the case, then there would have been no implied clash with the Executive's entitlement to grant remission of sentence" (Michael O'Brien –v- Governor of Limerick Prison [1997] I.L.R.M. O'Flaherty J. P. 355).

Thus, the "Butler Order" occupies an ambiguous position in the sentencing jurisdiction of the Irish Criminal Courts. It was twice given approval by the Supreme Court and once firmly denounced. Firstly, in People (D.P.P.) –v- Aylmer [1995] 2 I.L.R.M. 624, the Supreme Court upheld the validity of the reviewable sentence but resisted the temptation to comment upon its desirability. In Michael O'Brien –v- Governor of Limerick Prison 1997 2 I.L.R.M. the Supreme Court pointed to the reviewable sentence as a safe way of avoiding the intricacies of trenching upon the Executive domain in calculating remission of sentences. And finally in People (D.P.P.) –v- Finn 2001 2 I.R.25 the Supreme Court strongly advised against the continued use of the Butler Order or reviewable sentence. Accordingly the status of the Butler Order or reviewable sentence remains unclear. The question which immediately suggests itself at this juncture is to what extent do courts continue to use the procedure of reviewable sentences with a view to suspending the latter part of the sentence if reports of the prisoner are favourable in light of the pronouncements of the Supreme Court in *Finn* in 2001?[105]

In the survey of judges conducted in the Winter of 2007, a clear departure is demonstrated from the previous use of the reviewable sentence. This issue was broached specifically with the judges of the Circuit Criminal Court, the Central Criminal Court and the Court of

105 In chapter VII it will be seen how the Oireachtas seeks to deal with the issue of reviewable sentences by investing prison Governors with the sole discretion to apply to the sentencing Court to have the suspended part of the sentence revoked while the prisoner is actually serving the initial custodial part of the sentence. Section 99 (13) of the Criminal Justice Act 2006 provides that where a member of the Garda Siochana or as the case may be, the Governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an Order under this section applies has contravened the condition referred to in sub-section 2 he or she may apply to the Court to fix a date for the hearing of an application for an Order revoking the Order under sub-section 1.

Criminal Appeal, which were the courts which previously had used the Butler Order. There was no evidence at all of the use of a Butler Order in the District Court so the question did not arise in that jurisdiction. Some of the judges had presided in the criminal courts before the *Finn* case and those judges in particular were of interest on the topic to discern if they had abandoned such practices. Two of these judges identified the intensified use of the part suspended sentence as a replacement for the reviewable sentence. In their view, the part suspended sentence allowed for a continuation of supervision of the offenders' behaviour through the Probation Service as the monitoring agency. They stated:

> "…In the days when we had power to review our judgment or decisions when you would say "I am sentencing you to 5 years in prison but I will review this in 2 years" and then if you are told that everything is going well you would come to the conclusion (to suspend). But now that we are not allowed to do that, that's really where the part suspended sentences come in."A3J1CC

> "Now, the review of sentence was found to be impermissible and then low and behold, what came out of the woodwork after that was the partially suspended sentence which previous to that was never used. The partially suspended sentence is now given statutory backing so we have made that much progress." A5J1CC

Another judge of the Circuit Criminal Court reflected upon the former widespread use of the reviewable sentence as follows:

> "…it's an anathema to me…I actually think that it was nearly getting into disrepute here back in the early days before the *Finn* decision. Fellows for a bank or post office robbery that would normally carry 4 years were being given 8 and were being reviewed and reviewed which is just nonsense in my view". A7J3CC

A judge of the Supreme Court reflected upon the reviewable sentence in the present tense. He pointed out the monitoring and rehabilitative elements of the procedure may perhaps obscure punitive and deterrent considerations in the public mind when he stated:

> "…the reviewable sentence is another thing. The reviewable sentence is very defendant orientated naturally and one of the drawbacks again I think is that people do think that the sentencing process if all about the defendant and there is almost like planning a course of education for him or something of that nature and they don't think that other considerations are factored in." A8J1SC

The judges interviewed, especially the sentencing judges at first instance, appear to have abandoned the practice of reviewing sentences completely. However, it is possible that there are some prisoners in the prison system whose cases are not concluded. There appears to be no new sentence made lately which is constructed to include a review at a later date. Rather, the courts which formerly used the "Butler Order" are now deploying the part suspended sentence in its stead.

In the case of People (D.P.P.) - v - Finn [2001] 2 I.R. 25 the Supreme Court specifically referred to the provisions of Section 27 (3)(g) of the Misuse of Drugs Act 1977, as inserted by Section 5 of the Criminal Justice Act 1999. Section 27(3)(g) allows the sentencing court to review a sentence with a view to suspending the latter part thereof, provided the court is satisfied that the accused is or was addicted to drugs and that the addiction was a significant factor in the commission of the specific offence under Section 15(a) of the Misuse of Drugs Act 1977 as amended.[106]

Subsequently, the Court of Criminal Appeal was to clarify an important aspect of this statutory power to review a sentence under Section 27(3)(g). In People (D.P.P.) - v - Dunne [2003] 4, I.R. 87., Finlay Geoghegan J. declared that:

> "... in the absence of express legislative provision following the judgment of the Supreme Court in the People (D.P.P.) - v - Finn [2001] 2 I.R. 25, it is impermissible for a court to impose, as part of a sentence, a provision for review. Subsection (3) (g) in its terms only gives the court power to do so where a minimum sentence provided for in Subsection (3) (b) is imposed by the court as was done in this case"

106 Subsection (3)(g) provided:- " In imposing a sentence on a person convicted of an offence under Section 15(a) of this Act, a court -(a) may enquire whether at the time of commission of the offence the person was addicted to one or more controlled drugs, and (b) if satisfied that the person was so addicted at that time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one half of the period specified by the court under Subsection 3(b) of this Section." This Section is now replaced by Sec. 27(3) J and K Misuse of Drugs Act 1977, as per Sec. 33 Criminal Justice Act 2007.

Thus, the limited statutory review procedure allowed for under Section 27 (3)(g) of the Misuse of Drugs Act is predicated upon the sentencing court initially imposing a sentence of 10 years imprisonment or more and the statutory review is only allowable after a period of 5 years imprisonment has been served by the accused.[107]

It is ironic that the introduction of a power to review a sentence under Section 27(3)(g) introduced in 1999 by the Oireachtas was almost coterminous with the oppositional approach taken by the Supreme Court in *Finn* to disapprove of such a practice. Perhaps timing was a factor in all of this. Is it possible that the legislature would not have included such a provision had the Supreme Court pronounced its judgment in *Finn* prior to the enactment of Section 15(a) in 1999. In her judgment Finlay Geoghegan J. in People (D.P.P.) - Dunne (supra) speculated that the legislature:

> "... may have assumed that a general power to impose reviews existed." (Finlay Geoghegan J. p.92.)

She also acknowledged that this would have been a reasonable speculation.

If the general power of the courts to review sentences was perceived to exist, perhaps Section 27 (3)(g) might be viewed as an attempt by the Oireachtas to place a sentence under Section 15(a) out of reach of a reviewing court for the minimum period of 5 years. In other words, the purpose of the sub-section is not to grant a new power of review, but to limit the already existing power of review. This appears to be reinforced when one considers the purpose of Section 15(a) is to ensure that the courts would impose a minimum sentence of 10 years imprisonment initially and that the convicted person would serve such a sentence subject only to the statutory right to remission of sentence.

It could be argued that the general objection by the Supreme Court to the continued use of the Butler Order must apply with equal measure to the special and limited sentencing review of sentence procedure allowed for under Section 27(3)(g) – that the court is conducting, in all but name, an executive function of commutation and remission of

107 O'Malley remarks that the confinement of statutory reviews of sentences to cases in excess of 10 years under Section 27(3)(g) is overly restrictive, thus removing a worthwhile power of the courts to intervene in sentences within the 5-10 years range.

sentences. However, the procedure for review of sentence in the *Finn* case presented as an assumed common law power. Keane C.J. observed that the difficulty identified in *Finn* might not arise in a statutory arrangement when he stated:

> "it would seem to follow that the remission power, despite its essential judicial character, once vested under the Constitution in an executive organ, cannot, without further legislative intervention, be exercised by the courts. That, as has been noted, has been done in the case of certain drugs offences by the Criminal Justice Act, 1999." (Section 27(3)(g) Misuse of Drugs Act 1977 as amended by the 1999 Criminal Justice Act). Keane C.J. People (D.P.P.) - v - Finn [2001] 2 IR p.46.

From this it might be tentatively concluded that if such a generalised power to review sentences was given to the courts under a general sentencing statute, the difficulties identified by Keane C.J. in People (DPP) – v –Finn [2001] 2IR 25 might be avoided. What may ensue would not however be a complete and distinct separation of powers as intended by the framers of the Constitution but an overlap of jurisdictions between the Executive and the Judiciary to commute and remit sentences. The power of commutation and remission is firstly invested in the President under Article 13.6 of the Constitution of Ireland 1937.[108] Article 13.9 and Article 13.11 provide that the President is circumscribed in the exercise of such rights and powers which may be exercised only on the advice of the Government. One reading of Article 13.6 suggests that once a court passes sentence, the function of pardon, commutation and remission should be exercised by an authority other than a court as Article 13.6 presents as a counter-veiling measure to the power of the courts to impose a sentence in the first instance. Commutation or remission of sentence is usually a power vested in the head of State, although the executive branch of Government is often the recommending body (Sebba 1979:68). To interpret Article 13.6 and Article 15.2.1[109] of the Constitution of Ireland 1937 as a general power entrusted to the Oireachtas to confer the power of pardon, commutation and remission of sentences back to the courts again and specifically to the original sentencing court would seem to frustrate the purpose of the constitutional provision.

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108 Article 13.6 provides: The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President but such power of commutation or remission may, except in capital cases, also be conferred by law on other authorities.

109 Article 15.2.1. - The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas….

The bipolar arrangements of the courts imposing a punishment and another authority namely the President (Article 13.6) granting a remission of that punishment may be compromised if courts are further invested with the power to review the behaviour of the accused while in custody.

Arguably, once the statutory power to review a sentence offends against the doctrine of the Separation of Powers and Article 13.6 in particular, it offends against such provisions for all cases. The judicial validation of Section 27(3)(g) as an exception to the objections by the Supreme Court in *Finn* cannot be sustained merely because the power was conferred by the Oireachtas. It is speculated here that such a provision would not have been inserted into Section 27(3) (g) of the Misuse of Drugs Act 1977 as amended had the judgment in *Finn* been to hand when the legislation was drafted. But the anomalous situation now presents that Butler Orders, if validated by a statutory provision, may escape the designation of "impermissible" orders in future.[110]

When the issue of review of sentence by the court was addressed by the Law Reform Commission, a majority of the Commissioners (three) favoured removing the reviewing role of sentence from the courts. The Commissioners stated that the behaviour of a prisoner is a matter which falls within the domain of the prison authorities and not of the courts, while a minority (two) were not convinced that such cases involved intrusion on the function of the Executive. The minority of Commissioners believed that the review of sentences was helpful in the context of rehabilitation and that the review of sentences carries also the guarantee of objectivity (Law Reform Commission 1996 par. 11.15-11.17).[111]

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110 The writer is not aware of any reviews of sentence made under Section 27(3) (g) Misuse of Drugs Act 1977 as amended. Indeed the possibilities of such reviews are slim as a minimum sentence of 10 years must firstly be imposed before a review may be ordered after 5 years. A sentence in excess of 10 years is a rarity.

111 It should be noted that the deliberations of the Law Reform Commission, as a whole, focused almost exclusively upon the deterrent and rehabilitative elements of the sanction and that no effort was made to advance the rationale for the suspended sentence as an avoidance of custody. Whether the Law Reform Commission regarded this feature of the suspended sentence as so self evident as not to warrant any comment, one cannot say with any degree of certainty. However, a Law Reform consultative agency, seized of the function to comment on the suspended sentence as a whole, would surely have advanced this important aspect of the suspended sentence particularly as comparative analysis of the suspended sentence in England and Wales was central to their deliberations and discussions. The writer interprets this discussion of the suspended sentence by the Irish Law Reform Commission in their report as accurately reflecting a prevailing perspective on the suspended sentence which characterises the sanction essentially as a deterrent and rehabilitative device without overly stressing the avoidance of custody features of the sanction. Ultimately, the Law Reform Commission by a majority opted for the abandonment of reviewable sentences. Moreover, they advised the introduction of a statutorily regulated suspended sentence on the basis as set out in Section 50 of the aborted Criminal Justice Bill 1967.

The demise of the Butler Order or reviewable sentence may not be unconnected also with consequences within the judicial domain which followed as a result of the so called "Sheedy affair". Following on a review of a sentence by a judge of the Circuit Criminal Court, a prisoner was released upon review, in circumstances which were politically controversial. Eventually, the Judge in question resigned from office as did a colleague in the Supreme Court. The prisoner was later re-imprisoned upon review by the High Court. The report of the Department of Justice Equality and Law Reform into the affair specifically recommended:

> "…the opportunity should be taken to clarify the law as to the respective roles of the Courts and the Executive in the administration and review of sentences" (Sheedy Report 1999:20).

The practice of reviewing sentences, the report recommended, should in the light of what happened in the *Sheedy* case, be reviewed as a matter of urgency (Ibid.1999:19). Although the pronouncements of the Supreme Court in the *Finn* case, which ultimately sealed the fate of the reviewable sentence, were made in 2001, the reviewable sentence was already under critical review by the policy makers at that stage.

In summary, the reviewable sentence which invariably leads to the suspension of the remaining part of a custodial sentence might be considered a species of the suspended sentence. In the 40 years during which the procedure was used the courts exercised a supervisory role over the prisoner while serving a custodial sentence. Simultaneously, the sentencing courts exercised a limiting effect upon the early release of prisoners by the Executive by requiring the Prison Authorities to hold the prisoner in custody up to a certain date when the court would review the sentence with a view to suspending the remainder of the sentence. The pronouncements by the Supreme Court in the *Finn* case probably signify the ultimate demise of the procedure.

(B2) A Custodial Sentence Combined with a Subsequent Suspended Sentence.

The second type of part-suspended sentence to emerge in Irish sentencing practice might be described as a much more straightforward type of suspended sentence. This type of sentence requires an initial, but definite, period of custody to be specified and served which period is then followed by a definite period of custody which sentence is suspended for a

specified period. For example, the prisoner might be sentenced to ten years imprisonment with the latter six years suspended on condition that during the latter period s/he keep the peace and be of good behaviour pursuant to a recognisance.[112]

Usually, the convicted person is obliged to enter a peace bond for the period of the suspension. Unlike the "Butler Order", there is no review held after the initial period of custody. Instead, the suspended part of the sentence is pronounced by the court simultaneously with the custodial part of the sentence. Thus, the court, having pronounced sentence in full, to encompass the initial period of definite custody to be served and the suspensory period thereafter, is then *functus officio*. Such court, unlike the court making a "Butler Order" no longer retains seisin of the case.

The frequency by which the Central and Circuit Criminal Courts dispose of cases by way of part-suspended sentences without constructing the orders in the manner of a "Butler Order" demonstrates the affinity which the courts attach to both retributive and controlling approaches in the disposal of criminal cases. The frequency of use of the part suspended sentence in Ireland was unknown prior to this study. The part suspended sentence is counted as a custodial sentence for statistical purposes only. Thus the particular disposal remains hidden within the cohort of custodial sentences. To ascertain data on the use of the disposal in the Circuit Criminal Court, the court which uses part suspended sentence with greatest regularity, the writer examined the full cohort of convictions in the Circuit Criminal Court in Cork and was facilitated in a similar survey in the Circuit Criminal Courts in Dublin for the year 2006.[113] In the sample survey of part suspended sentences for 2006 the writer found that the Circuit Criminal Court imposed a part suspended sentence in 40.1% of the total custodial sentences actually imposed in the Dublin Circuit Criminal Court. While in the Cork Circuit Criminal Court, that court imposed a part suspended sentence in 37.93% of all actual custodial sentences. In the Central Criminal Court, using full data, it was found 47.45% of actual custodial sentences where the court had a discretion were partially suspended.[114]

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112 The factual sentence in Michael O'Brien –v- Governor of Limerick Prison. [1997] 2 ILRM, 249

113 The writer attended at the offices of the Circuit Criminal Court in Cork in September 2007 and in Dublin Circuit Criminal Court office in October 2007 to examine the case books.

114 Data on the frequency of use of the part suspended sentence is not available in any published source. To access this information the writer conducted a survey of all sentences imposed at two of the busiest Circuit Court Criminal Courts in the State for the year 2006. From this data it was possible to count the number of part suspended sentences imposed. In Dublin Circuit Criminal Court 40.1% of all custodial sentences were partly suspended, whereas in Cork 37.93% of all actual custodial sentences were partially suspended (Dublin full sentence of imprisonment 333, partially suspended 223; Cork Circuit Criminal

By combining a period of custody with a period of supervision of sentence, classical sentencing norms of desert are combined with crime prevention measures of social control and behavioural change. However, O'Malley criticises the part-suspended sentence on the grounds that it offends against the principle of proportionality. He asks "if an offence merits ten years imprisonment, why should the last six be suspended on review? (O'Malley 2000:294). As noted in the previous chapter, the suspended sentence and the part suspended sentence are both open to the viscissitudes of sentencing inflation and net widening in practice. A governing principle such as that given in *O'Kæfe* has not been formally pronounced for the suspended sentence in Ireland. But besides the issue of proportionality involved, it is also likely that more than one sentencing rationale is deployed by Irish sentencers when considering suspended sentences in general and part-suspended sentences in particular. Although O'Malley advocates the necessity of the *O'Kæfe* principles, the writer contends that the operation of the suspended sentence in Ireland is essentially unfettered by such an approach with crime prevention measures playing an equally prominent role in the admixture of sentencing considerations in addition to issues of proportionality. Thus, the practice of imposing suspended sentences and part-suspended sentences may offend against a central tenet of Irish sentencing law in certain cases where control of the offender by a threat of imprisonment is disproportionate to the maximum penalty necessary to secure compliance by him/her. Moreover, the same criticism which O'Malley makes against the part-suspended sentence might equally be levied against the wholly suspended sentence by applying the same *O'Kæfe* principles. If the offence is sufficiently serious and the circumstances of the offender are such that all non-custodial sentencing options should not be used and the court is firmly of the view that a custodial sentence is warranted as prescribed in *O'Kæfe* and *MahWing* (1983) 5Cr.App.R.(s) 346), the principle of proportionality is equally breached if the court suspends the entirety of the sentence and does not require the convicted person to serve one day of say a three year sentence of imprisonment.

Court full sentence of imprisonment 90, partially suspended sentence 55). Note wholly suspended sentences are not counted in these figures. The part suspended sentence was hidden within the full custodial sentence. In the Central Criminal Court for the year 2006 a total of 115 cases were dealt with. Of these 85 resulted in convictions. Of these 20 received mandatory sentences. Of the remainder (65), 6 were wholly suspended and 28 partially suspended. Accordingly, 47.45% of all discretionary sentences of imprisonment in the Central Criminal Court for 2006 were partially suspended. (Personal Surveys and Communications with Mr. Liam Convey, Registrar -28th December 2007).

It is worth noting that these sentencing practices, particularly the practice of part-suspension of sentence, emerged in the context of perceived interference by the Executive in the judicial domain over the last thirty years or so. Prison overcrowding became so acute in the late 1980s and the early 1990s that serious offenders were released within a short time of committal to prison for reasonably long sentences[115]. The Central and Circuit Criminal Courts utilised the review procedure to ensure the convicted person served a period in custody at least until the review came up for hearing. Thus, the Executive could not release the prisoner in the interim period. Additionally, by imposing conditions upon the prisoner to behave and particularly to remain drug free while in custody, the courts sought to initiate changes in the behaviour of the prisoner while at the same time extracting a punitive measure by imposing a minimum period of custody to be served. The requirement to pursue drug treatment and/or to remain drug free while in custody emerged as a frequent condition of reviewable sentences, particularly in the Dublin Circuit Criminal Court. But perhaps the most salient feature of the part-suspended sentence as exercised in the Irish criminal courts was the consecutive advancement of two sentencing rationales. Firstly, the extraction of retribution by obliging the offender to serve an initial period in custody was combined with the second feature of control of the released prisoner in society under the Damocle`s sword of further punishment if the convicted person should further transgress or not abide by conditions addressed to mould his/her behaviour for the period of suspension.

(c) District Court Suspended Sentence.

Although the straightforward suspended sentence is sometimes used in the disposal of criminal cases in the District Court, another variation of the suspended sentence has evolved within that jurisdiction. This involves the imposition of a specified custodial sentence which is then suspended but not upon the convicted person entering into a recognisance to keep the peace. Instead the court records the custodial sentence and then suspends it on condition that the convicted person is not convicted for a subsequent offence within a specified period (usually up to two years duration). This clearly is a departure from the suspended sentence described by Osborough and based on reported

115 On 10 December 2008, prison occupancy was at 114/% of capacity and an extra 10% of prisoners were on temporary release (personal communication - Department of Justice Equality and Law Reform 10th December 2008).

cases but it retains, it is argued, all the critical elements of the suspended sentence relating to time and conditionality.[116]

In the survey of judges, the District Court judges reflected upon the practice of suspending a sentence on condition that the offender does not re-offend within a certain period of time. A District Court judge in one of the focus groups spoke about the new form of suspended sentence under Section 99 of the Criminal Justice Act 2006 and the previous common law procedure as if they were a seamless whole and not mutually exclusive procedures. In particular she stated:

> "…In relation to a suspended sentence, particularly now that the new Act has come into force, I regard it as one of the greatest forms of sentencing…because you are putting it up to them if you are suspending them from the warrant issuing for 12 months provided they do not commit or are convicted of a further offence."A1J1DC

A judge of the Circuit Criminal Court while recognising the requirement to make use of a recognizance under the new suspended sentence stated:

> "…Again yesterday I had one and I felt he wasn't going to re-offend again. I just suspended it simpliciter. More often than not they enter into a bond. I would certainly say that over 80% are bonds…"A3J1CC

Although Osborough (1981) points to the requirement that a sentence of imprisonment was only suspended when the offender entered into a bond, this was not necessarily the practice, especially in the District Court where the procedure of staying the issuance of a warrant was the predominant practice. Similarly in the Circuit Criminal Court the use of the bond was not universal.

The views expressed by the two judges above may indicate that some judges do not feel necessarily obliged to follow in every detail the new format for suspending a sentence but

116 When revocation is considered, this type of sentence utilises a higher standard of proof of a further conviction rather than a breach of the peace which may not necessarily amount to a criminal offence (Dignam –v- Groarke and the D.P.P. 17th November, 2000 IEHC 150 Bailii).

may feel at liberty to continue with the procedures which the judges developed themselves prior to 2006.

There are also a series of variations in the use of the suspended sentence which may not in fact amount to fully fledged suspended sentences. One example of such a disposition might present where a sentence is stated to be a suspended sentence but where no operative period is specified. Another variant is a suspended sentence of imprisonment which is suspended for an operative period but where no conditions are attached such as a requirement to enter a bond to keep the peace and be of good behaviour or subject to the offender not being further convicted within a specified period of time. This latter variation of unconditional suspended sentence was criticised by the Court of Criminal Appeal in People (D.P.P.) –v- Martin Byrne, Court of Criminal Appeal 19th of January 2004. Such variations on the suspended sentence may present as valid sentences but may be subject to immediate challenge when the issue of activation of the sentence occurs. For example, the period of the custodial sentence and the operative period of suspension may not be coterminous. Where such different periods are specified, stated reasons must be given for a longer operative period (People (D.P.P). -v- William Hogan, unreported, Court of Criminal Appeal, 4th March 2002). Moreover, if an offender on a suspended sentence for a specified period has not been conditionally bound to keep the peace, either by a bond or by a court order, there may be distinct difficulties for the prosecution in activating the original sentence if the suspension is unconditional. O'Malley (2006:254) claims that the suspended sentence is a real punishment in itself for the stigma that it carries and the possibility that it may be activated for a breach of a condition. In the latter examples given, the suspended sentence carries only the stigma of the punishment but no possibility of activation. The classical suspended sentence has always been structured as a conditional sentence subject to enforcement on breach of a specified condition. Indeed, Section 50 of the Criminal Justice Bill, 1967 emphasised the conditionality of the sentence as a defining feature. In particular, enforcement of the sanctions could only proceed under Section 50 on the basis of a breach of a condition (Section 50 (1) (b) Criminal Justice Bill, 1967, Criminal Justice Act, 2006 Section 99(2)(17).

The straightforward suspended sentence which first appeared in the late 19th and early 20th centuries in Irish sentencing practice has evolved on a judge made basis into a variety of conditionally suspended custodial sentences. In general, the organic growth of these

variations of suspended sentence was a pragmatic response by the judges of all the criminal court jurisdictions to counter substantive and procedural difficulties which presented in the structuring of the sanction. It will be shown later when discussing the activation of the suspended sentence how successful these pragmatic responses proved to be.

DEFERMENT OF PENALTY

Another sentencing process which the Irish criminal courts have developed is the practice of deferment of penalty. Deferment of penalty is closely related to the issue of the suspended sentence and, as will be demonstrated presently, is frequently a precursor to the making of a suspended sentence. The authority to defer sentence has been assumed by the criminal courts in Ireland on a common law basis (Osborough 1981). The usual purpose for the deferment of sentence, rather than pronouncing a penalty there and then, is to allow the convicted person an opportunity to show his/her *bona fides* in light of submissions made in mitigation by his/her counsel or solicitor. These may include a commitment to seek help with a drug or alcohol dependency, anger management, the opportunity to enter employment in the near future or the making of restitution. Usually, a case is adjourned to allow the convicted person to address specific issues and these are recorded in the order as matters to be addressed on the return date for sentencing. Additionally, the court may specify an indicative sentence if the offender fails to comply with the terms of the adjournment but this is not universal as a practice. Frequently, the deferred sentence is combined with another judicially developed measure, that of adjourned supervision of the offender by the Probation Service. By inserting the supervisory role of the Probation Service, without placing the convicted person on a probation bond under section 2 (1) of the Probation of Offenders Act, 1907, the convicted person's "progress" during the period of deferment of sentence can be monitored and reports, including interim reports, may be provided to the court. It is unusual for a court to impose a custodial sentence upon a convicted person who has complied with the conditions of the adjourned supervision by the Probation Service unless the convicted person, although compliant with the conditions in the instant case, is further convicted of other offences in the meantime. At the conclusion of the deferred period, if the convicted person is compliant and restitution or rehabilitation has been addressed, the court may dispose of the case in a number of ways including the imposition of a suspended sentence to further the coercive influence of the court in the offender's behaviour. Alternatively, the convicted person may be placed on a Probation Bond which may be re-entered before

the court if the convicted person fails to comply with the terms of the bond, which may include the continuance of conditions in place during the period of deferment of sentence. There is no maximum time limit for the deferment of penalty in Ireland but O'Malley (2000:317) suggests that a period in excess of twelve months deferment of penalty would rarely serve any purpose. The emergence of the deferred sentence singly or in combination with the joint supervision by the Probation Service might be considered as a form of adaptive behaviour on behalf of the Irish Judges exercising criminal jurisdiction in light of a distrust of discretionary practices of the Probation Service which results in the failure to bring non-compliant offenders back to court in a timely manner (see earlier chapter 5). The practice may also, in part, be attributed to a distrust of the Executive in the exercise of immediate or temporary release of the prisoner (Section 2 of the Criminal Justice Act, 1960 as amended) on the basis of representations and having regard to the circumstances of the offender when lodged in prison. By adopting the procedure of deferment of sentence with or without adjourned supervision, the court retains immediate ownership of the process which is not contingent upon the discretion of either the Prosecution or the Probation Service to re-enter appropriate cases.

Offenders with drug or alcohol addictions were identified by the judges in the survey in particular as suitable candidates to have their sentences deferred. One judge spoke of deferment of penalty as a positive instrument of behavioural change as follows:

> "I haven't the slightest doubt from experience in the Drug Court that where orders of that nature with conditions in them are supervised on a regular basis by court, they are more effective than if they are simply left to the Probation Service to seek compliance of it. I haven't the slightest doubt about that…whether the courts have time to do it or not is a separate issue…what you are doing is making the defendant accountable to the court rather than to the Probation Service…the court has the ultimate power to imprison the defendant, the Probation Services do not". A2J1DC

When the same judge was asked if the Probation Service could re-enter a case where there was non-compliance he acknowledged readily that they could but claimed:

> "but I don't think the Probation Service has the same effect."A2J1DC

When the sentencing court defers the imposition of penalty, the usual purpose of such an exercise is to establish the *bona fides* and ability of the convicted person to comply with conditions tailored to change his/her offending tendencies. Invariably, once the pattern of compliance by the offender is established upon the return date for sentencing, a non-custodial sentence is imposed. The range of penalties considered by the court on the return date for sentencing are usually informed by the behaviour of the offender during the deferred period. Consequently, the sentencing court tends to adopt the approach previously taken when deferment was originally made. However, as no further deferment may be contemplated by the court, although this is not always the case, a final sentence is called for. If the court is minded to continue the behaviour modification approach it is not uncommon for the convicted person to be placed upon a suspended sentence subject to the same conditions during the period of deferred penalty. Deferment of penalty may thus be seen as a precursor to the imposition of a variety of suspended sentences but usually a straightforward suspended sentence only is applied.

Before proceeding to the next section where the individual parts of the suspended sentence are examined, a summary of the chapter thus far is required. While the suspended sentence in Ireland may have emerged as a reasonably standard type of sanction originally, it is observed that variations of the sanction developed across the various criminal court jurisdictions. Certain courts placed greater emphasis upon particular types of suspended sentences. The Central and the Circuit Criminal Courts utilised to a considerable degree the reviewable sentence. This provided for a review of the custodial sentence which was followed by the suspension of the remainder of the sentence. Meanwhile courts of summary jurisdiction developed a distinct variety of suspended sentence by withholding the warrant of execution conditionally. The former courts were challenged in their continued use of the reviewable sentence in the *Finn* case and seem to have replaced the Butler Order with the nearest analogous variant namely the part suspended sentence. Meanwhile the summary courts have the opportunity, whether they will avail of it or not, to abandon their hybrid sanction by fully adopting the procedures of Section 99 Criminal Justice Act 2006 which will entail the use of a bond where previously this was not generally used. Deferment of penalty is presented as a procedure adopted by the criminal courts as an interim measure to test the *bona fides* of the offender and to ascertain his/her ability to

maintain progress on a treatment programme. Where compliance is indicated, invariably a suspended sentence is utilised as a final disposal to ensure compliance into the future.

THE CONSTITUENT ELEMENTS OF THE SUSPENDED SENTENCE

A suspended sentence is a determinate period of incarceration, whether of imprisonment or detention, which period of incarceration the convicted person will not be called upon to serve provided s/he keeps the peace and abides by any conditions imposed for a specified period of time. The latter period of time, sometimes referred to as the operative period, is usually specified as the duration period of a bond entered into by the convicted person to keep the peace or it may be specifically set out in the order of the court when the bond is not required. Prior to 2006 there appeared to be some confusion as to the legal device which structured the period of suspension.

Most courts require that the convicted person enter into a recognisance to keep the peace and to abide by other specified conditions of the bond. However, some courts particularly the District Court, prior to 2006 did not require the convicted person to enter into any recognisance at all. Whether or not a bond is employed, the essential objective of the sanction is to secure the undertaking of the convicted person to comply with either broad ranging obligations to keep the peace and to be of good behaviour or more specific conditions tailored to his/her cryogenic situation. In courts which deal with indictable offences only, invariably, the practice is to require the convicted person to enter a formal bond to keep the peace and to come up for sentencing if called upon to do so. In courts of summary jurisdiction, frequently, a convicted person was not obliged to enter into a formal bond at all but the operative period of the suspended sentence was specified in the spoken order of the court and recorded as such.

Osborough (1981:222) states that the straightforward suspended sentence is composed of five distinct elements. First, the order is one which warrants a custodial sentence. Secondly, there must be authority to suspend the execution of the sentence (People –v- McIlhagga 1971 supra). [117] Thirdly, the suspension is made conditional upon the undertaking of the accused as to his/her future conduct. While the undertaking may vary

117 As observed in chapter five, the District Court in the Irish Free State commenced using the suspended sentence in the late 1920s, while the Magistrates Court in Northern Ireland refrained from such use until enabled to do so in statutory form in 1968.

as to conditions, there are two conditions which invariably are imposed, namely the condition to keep the peace generally and to come up for sentence when called upon to do so. Osborough observes these obligations are secured by the convicted person entering into a bond which recites these obligations and other specific obligations or conditions contained in the order and bond. The bond is entered into by the convicted person with a promise to pay a specified sum of money as surety, with or without independent sureties, which sum will be called upon for payment if there is a default. As observed above however, the future behaviour of the convicted person is not always secured by the entry into such a bond, but may be otherwise secured by the order of the court itself. Osborough observes that the final element of the suspended sentence is an in-built timed self-destruct feature. When the operative period expires, the convicted person is no longer liable to any sanction for breach of the bond.

(i) The Bond.

The use of a bond or a recognisance to secure the consent of the convicted person to fulfil the conditions of the suspension of the sentence might be regarded as a convenient vehicle for the formalisation of the sanction. When there is non-compliance with the conditions of a suspended sentence, the terms of the suspension of the sentence are clearly set out in the bond when activation is considered. Sandes (1939:167) has defined a recognisance as:

> "[A] contract of record entered into before the Court or before a District (Judge), by which the person entering into it acknowledges himself to be indebted to the State in such sum of money, to be levied off his goods and chattels, lands and tenements, as the Court or Justice may fix, if he shall fail to fulfil the conditions specified in the recognisance" (Sandes 1939:167).

The conditions specified in a recognisance, when a suspended sentence is contemplated, always require a convicted person to keep the peace and to be of good behaviour and to come up for sentence if called upon to do so. Further conditions may also be imposed.

When a bond is used to secure the future behaviour of the convicted person under a suspended sentence, the period during which the person is to be bound over should be coterminous with the period of suspension of the sentence or the operative period. For example the court might suspend a sentence of imprisonment of say two years for a period of two years on condition that the convicted person enter into a bond to keep the peace for three years. If the bond is not correctly structured, the convicted person may find

himself/herself bound over for a longer period than that of the period of suspension or alternatively for a shorter period. In either case, if an issue arises in respect of activation of the sentence, this may cause significant difficulties in determining whether the person was actually bound over for the entirety of the operative period of the suspension. In the example given above the two year period of custody which is suspended for two years would be incapable of activation if there was a breach during the third year while the convicted person is bound over by the three year bond. The bond therefore should have been coterminous with the period of suspension.

Moreover, as O'Siochain has observed "at the end of the specified period, if the recognisance is kept, there is a complete discharge" (1977:27). Accordingly, the operative period of the suspended sentence should never exceed the time fixed in any peace bond to secure good behaviour and usually both periods are specified as the same.

A recognisance is a promise to pay the State a sum of money in the event of failing to fulfil conditions. However, the real purpose of a recognisance is to secure the compliance with conditions of a suspended sentence and has precious little to do with making payment in default to the State for breach of conditions. It is argued here that the true purpose of the requirement obliging the convicted person to enter a recognisance is centred around the actual mechanism of the bond itself whereby the prosecution may serve notice to have the accused returned to court for breach of a condition of the bond and seek the activation of the sentence rather than the extraction of any payment of surety. In the statutory suspended sentence which will be discussed in the next chapter, the mandatory bond may be secured on the signature of the offender alone without the necessity to provide either a personal or independent surety (Rules of the District Court 1997, Order 28a). Anecdotally, the writer is not aware of any order of a court directing payment of a surety including any independent surety on foot of breach proceedings. However, he is aware of the use of the breach procedure itself to activate the custodial sentence suspended without reference to any application to estreat the surety of the bond.

Thus in practice, the estreatment of sureties on the breach of a bond is rarely addressed as an issue. Instead, the court will focus upon the substantive issue of the breach itself and address instead the issue of activation of the sentence. Rarely is the estreatment of sureties addressed when dealing with a revocation of a suspended sentence

(ii) Time Elements.

A suspended sentence contains a number of time elements, namely the specified period of imprisonment and the period of suspension or the operative period. O'Malley (2000:292) cautions against the over-extension of the specified period of imprisonment by sentencers, on the grounds that the convicted person may suffer a disproportionately severe penalty in the event s/he is called upon the serve the specified penalty if s/he is breached. As noted, the earlier deployment of the suspended sentence in England and Wales showed a reactivation rate of 27%. As there is no prescribed equivalence between an actual period of custody and a suspended period of custody, the courts in Ireland, as elsewhere, may have tended to extend the suspended period of custody (Ryan and Magee 1983:401) and this is borne out in the interviews with judges as indicated in chapter 5. O'Malley (2000:292) advises that the sentencing court should firstly determine that a custodial sentence is the most appropriate penalty to apply and then and only then to calculate the sentence of custody to be actually served, before going on to even consider applying a suspension of the custodial sentence (R –v- Mah-Wing (1983) 5Cr. App. R.(S) 347). In this way the court will avoid making two critical errors, firstly, by failing to apply a custodial sentence only as the last resort and secondly by suspending such penalty only when the custodial penalty would have been imposed.

The second time element relates to the operative period of the suspension of the sentence. The period during which a sentence of custody may be suspended is unregulated in Ireland, except for the jurisdiction of the District Court. In the District Court, a suspended sentence prior to the coming into force of the District Court Rules in 1997 was limited by Rule 68(2) of the District Court Rules 1948. Notwithstanding the operative period recited in the District Court suspended sentence, the Rule prohibited the issuance of a Warrant to enforce such a sentence after the expiration of six months from the date of the making of the order. In other words, a suspended sentence of six months imprisonment suspended for two years could not be activated after six months from the date of the making of the original suspended sentence.[118] However, since 1997 the power

118 District Court Rules 1948 Rule 68(2) provides: when imprisonment is ordered to take place in default of payment of a penalty, the Justice shall issue the Warrant of Committal at any time after such default. When imprisonment is to take place on the non-performance of a condition or where the execution of the sentence of imprisonment has been suspended by the Justice, the Justice shall issue the Warrant of Committal upon his being satisfied of the non-performance of a condition or of the failure of the Defendant to carry out the terms upon which the sentence was suspended and it shall not be necessary in any such case to serve upon the Defendant any notice of an application for the issue of the Warrant. Where the execution of a sentence of imprisonment has been suspended, no Warrant shall be issued to enforce such sentence after the expiration of six months from the date of the making of the Order.

of the District Court to enforce a suspended sentence for a longer period has been conditionally extended by Order 25 Rules 3 and 4 which provides:

Issue of Warrants in execution of Court Orders

> Rule 3: Where the Court, upon imposing a sentence of imprisonment, conditionally suspends the execution thereof, it may, upon the application of the prosecution issue a Warrant of Committal on being satisfied of the failure of the accused to comply with the terms upon which the said sentence was suspended.
>
> Rule 4: Where by order, the execution of a sentence of imprisonment has been conditionally suspended; no Warrant shall be issued to enforce such sentence, later than six months from the expiration of the time fixed by the said order for the performance of the condition. (District Court Rules 1997).[119]

This Rule has been interpreted by the Judges of the District Court as extending the time allowed for the activation of the penalty to include the operative period and a period of six months thereafter, provided the sentence is suspended subject to the fulfilment of a condition. In other words, if the District Court imposes a conditional sentence of six months imprisonment and then suspends the penalty whether by a recognisance or otherwise, on condition that the offender does not receive a further conviction within two years, Order 25 Rule 4 allows the District Court to activate the sentence at any time for the period of the suspension, in this case two years plus a period of six months thereafter allowed under the Rule.

Thus, the six month time limit imposed upon the activation of the District Court suspended sentence may be avoided provided the court specifies precisely the period for the fulfilment of the condition. The District Court has jurisdiction to impose consecutive custodial sentences to a maximum of 24 months.[120]

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119 Osborough (1982:255) has observed that this rule in respect of the 1948 District Court Rules, while ostensibly a procedural rule set out in secondary legislation, may import aspects of substantive or primary law. The making of substantive law within a rules making committee would be ultra vires their powers which are limited to prescribe only rules of practice and procedure. As noted, the limiting provisions of six months on the issuance of a Warrant may be avoided under the 1997 District Court Rules provided the suspended sentence is made subject to the fulfilment of that condition which will endure for the entirety of the period of suspension.

120 Criminal Justice Act, 1951, Section 5 as amended by Criminal Justice Act, 1984, Section 12(2).

Notwithstanding the maximum fixed custodial period which may be imposed by the District Court, there is no maximum period prescribed in law for the period of suspension of the custodial period. Potentially, the District Court could impose a custodial sentence of one year suspended for a period of twenty years. This might be criticised as being disproportionate having regard to the sentencing jurisdiction of the District Court but at present there is no such prescribed limitation.

None of the judges of the District Court who were interviewed believed that there was a limitation on their power to suspend a sentence only for the period of custody imposed. A Supreme Court judge expressed the view that a longer period of suspension might be permissible when the District Court makes a suspended sentence provided the period of suspension does not exceed the jurisdiction of that court. However he was concerned about the extension of the suspensory period in respect of sentences imposed following a trial on indictment when he stated:

> "Well a period like 12 months wouldn't trouble me, but a long period during which people might be expected to change would. Many of the Defendants are young, it has to be borne in mind, and in 2 or 3 years a young person's personality and activities may change totally…especially if the sentence is a significant one, I would be reluctant to contribute to a situation where it might be activated in a situation that didn't make it suitable at all. The other thing is you have to bear in mind the jurisprudence which says that the judge asked to activate the sentence has a very limited discretion. There is a Court of Criminal Appeal decision[121] about that …Judge Elizabeth Dunne was asked to activate the sentence and she held correctly, as the Court of Criminal Appeal found, that she had little discretion in particular if the sentence was a long one, was for 8 or 10 years. In particular she could choose between activating the sentence or not activating it. She couldn't say well we'll activate a year (instead of 8 years)." A8J1SC

121 People (D.P.P.) -v- Ian Stewart, extempore Court of Criminal Appeal 12 January 2004. However, Under Section 99 Criminal Justice Act 2006 the court may now apply a lesser period of custodial sentence upon breach on a discretionary basis.

Thus, the utility of suspending the sentence for a longer period may be defeated in certain circumstances especially where an offender is liable to change his/her behaviour in early course but would otherwise remain liable to the risk of a substantial custodial sentence.

In the neighbouring jurisdiction of England and Wales, where the suspended sentence has been regulated by statute for decades, Wasik has observed that:

> "There appears to have been no appellate discussion of what principles might underlie the selection of operational period length. It is not clear, therefore, whether this period should reflect primarily the seriousness of the offence (as should the length of the term), or whether other matters, such as the sentencer's perception of the likelihood of the offender remaining conviction-free during a lengthy operational period, may properly be taken into account. (Wasik 2001:158-159)

In a number of jurisdictions where the suspended sentence is provided for under statute there is no requirement that the operative period should correspond exactly with the custodial period (Weigend 2001:188, Ashworth 2005:9.4.2, Tait 2007:351). Instead sentencers in Germany, England and Wales and Victoria are permitted under their statutory forms of suspended sentence, to suspend a sentence for a period in excess of the custodial period but there is usually a maximum limit of 3 years set in the statute for the suspension of the sentence. Similarly, the custodial periods are usually limited to periods of imprisonment of up to 2 years. Longer periods are discouraged by statutory limitation.

As observed in chapter 5, the judges in general believed they had the power to structure a suspended sentence by increasing the period of suspension over the custodial period to be potentially served. However, one Circuit Criminal Court judge did point to the potential illegality of the procedure when he cautiously observed:

> "I don't [increase the period of suspension over the custodial period], because of the controversy there was in the Court of Criminal Appeal about whether or not you can do it. There is some doubt. I know a predecessor of mine used to go for the longest if he was suspending it. He would go for the longest possible sentence suspended for the longest possible time. Okay that's one way of doing it. If it

was 5 years for assault and you were getting a suspended sentence, you would get 5 years for the assault and it is suspended for 5 years. What I would tend to do is measure the sentence as appropriate, say 3 years for an assault and suspend it but for 3 years. I do not in general terms suspend for longer than the term of the imprisonment because I have doubts about the legality."A5J1CC

In the case referred to by A5J1CC, Keane C.J. declared that it is not a desirable practice to suspend the sentence for a longer period than the actual term imposed unless there were exceptional circumstances pertaining (People (DPP –v- Hogan, unreported Court of Criminal Appeal, 4th March 2002).[122] The Chief Justice was concerned, as was the Respondent A8J1SC, to avoid the difficulty presented in the case of *Ian Stewart* where under the common law procedure, the court has no jurisdiction but to impose the full sentence once the decision to activate the sentence has been made. As noted, this difficulty has been significantly ameliorated by the passing of Section 99(10) Criminal Justice Act 2006, which allows the court wide discretion to impose a lesser custodial sentence when the sentence is to be activated. Accordingly the reluctance of the Court of Criminal Appeal to contemplate a operative period in excess of the custodial period may be significantly addressed by this allowable discretion.

As noted, there is specific statutory provision in Northern Ireland[123] and in England and Wales to allow for the suspension of a sentence for a period of in excess of the actual term of custody imposed. It is important to distinguish the difference between a period, allowed under statute, which permits suspension of a sentence for a period in excess of the custodial period and a period prescribed in a statute which limits the revocation of a suspended sentence to a certain period of time. This distinction seems to have presented in the first attempt to put a suspended sentence on a statutory footing in Section 50 of the Criminal Justice Bill 1967. The Bill would have allowed for the making of a suspended sentence to be suspended for a period in excess of the actual sentence by the use of the phrase in Section 50(1)(a) "as the court thinks proper". But the Bill then went on to limit the period during which a suspended sentence could be activated in Section 50(2) by stating that the same suspended sentence should cease to be enforceable after 3 years. In

122 This was approved in the case of Gareth MacCarthy –v- Judge Brady (High Court, unreported 30th July 2007) when De Valera J. stated obiter that the period of suspension should not exceed the stated period of custody. De Valera J. placed great emphasis on the Ian Stewart case also. However the suspended sentence before the court on that occasion was originally made prior to the Criminal Justice Act 2006 coming into force.

123 Section 18(1) Treatment of Offenders Act 1968 as amended by Article 9(1) Treatment of Offenders Order 1989.

other words, a suspended sentence of 5 years suspended for 5 years would be unenforceable after 3 years but would conceivably be a valid suspended sentence in itself.

The aborted 1967 Criminal Justice Bill sought to indirectly limit the operative period to three years for all courts and this was endorsed by the Law Reform Commission (1996:64). The Criminal Justice Bill, 1967 provided

> Section 50(2): Where a sentence has remained suspended under this Section for three years, it shall then cease to be enforceable except in the event of a breach during that period of the condition subject to which it was suspended.

Accordingly, while the suspended sentence could be made by a court for a period of say five years, if sub-section two was given force of law, it would render such sentence unenforceable save in respect of a breach committed during the period of suspension of up to three years duration.

The issue of time can give rise to particular difficulties if the fulfilment of specific conditions require to be addressed by the convicted person not only within the overall operative period of suspension but specifically within a shorter period therein. For example, if a court specifies that the convicted person present for drug treatment without specifying the time frame for such compliance, the convicted person might claim to have fulfilled such a condition by presenting for treatment on the last week of the second year of his sentence suspended for a period of two years.

Sometimes a court might suspend a sentence on condition that the offender would pay a specified sum of money in compensation. If the period for the payment of compensation is not specified within the operative period and the operative period of the sanction expires, it is arguable that the offender may escape liability and may not be amenable to the original sentence imposed notwithstanding the non-performance of the condition to pay compensation. As a result, courts are somewhat cautious to impose a suspended sentence where payment of compensation is required. Usually, the penalty is deferred to allow full payment and only then is the sentence suspended (Osborough 1982:230). Alternatively, a court may specify that the sentence is suspended for say two years provided X euros is paid in full within six months of the date of the sentence. In this way, the operative period will

continue for eighteen months to allow proceedings to be brought for breach of the non-performance of the condition if the monies are not paid within the initial six month period.

In summary, in constructing the suspended sentence both as to the custodial period to be served and the period of suspension thereof, great care should be taken to ensure that the custodial period imposed is not extended in the belief that the Defendant will never be called upon to serve such period of custody. Moreover, the operative period or the period of suspension should not be held over the convicted person for a disproportionate period of time. Any requirement to ensure compliance with conditions within the operative period should be clearly set out by the specification of time limits for the fulfilment of such conditions within the operative period.

(iii) Activation of the suspended sentence and time.

As mentioned, the suspended sentence in Ireland utilises two distinct time elements, namely the period of the sentence which is then conditionally suspended for a further period of time which is known as the operative period. However, a third time element may be identified in the overall scheme of the suspended sentence when the procedure for activation of the original sentence arises.[124]

This time element concerns the possibility that a convicted person on a suspended sentence may not be amenable to sanction for breach of the bond if proceedings for breach are not taken against him/her during the same period. Must the activation of the sentence be invoked and concluded within the operative period of the suspension if the breach occurred during the operative period or does the liability for sanction endure beyond the expiration of the operative period? It could be argued that a custodial sentence of three years suspended for three years where the offender is bound over to keep the peace for three years must be capable of activation after three years if the offender breaches his/her bond on the last day of the third year. Otherwise the validity of the activation of the sentence would be entirely contingent upon the offender committing a breach within a period which allowed sufficient time for the prosecution to set in train the notification procedure and for the court to conclude the sentencing issue all within the period of suspension.

124 This time element is discussed at this juncture instead of later in this chapter under the topic of activation of the suspended sentence. It is more properly an element of the sanction albeit an unpredictable one.

The net point is this – if the operative period is coterminous with the period fixed in the recognisance can the convicted person be sanctioned for a breach during such period if the operative period has expired? It could be argued that all that remains by way of sanction at that stage is the obligation to pay any surety for breach of the recognisance, but a convicted person so bound over may not be amenable to the main sanction of the suspended sentence itself.[125]

The necessity to seek a revocation of the suspension of the sentence during the period fixed for the duration of a bond or the operative period is critical if one applies the decision of Murphy J. in D.P.P. (Comiskey) -v- Traynor (a minor) (High Court 27th of July, 2005, IEHC 295). In the latter case the District Court having placed the offender on a probation bond for twelve months revisited the case on a number of occasions during the twelve month period to review the offender's compliance with conditions of his bond. The offender had not complied with conditions specified in the probation bond. The court finally adjourned the case for sentence outside of the 12 month period and without extending the period of the probation bond. The High Court held that to properly proceed to conviction and sentence, when the accused had been in breach of conditions of a Probation Order, this must be done within the period specified on the Probation Order. Accordingly, time must be seen to be of the essence in any application to revoke a suspended sentence.

The extent to which this may be analogous to the bond for a suspended sentence was addressed in the case of Mark McManus -v- Judge O'Sullivan and the D.P.P., High Court, unreported 5th March 2007 where Dunne J. rejected the analogy argument on the basis that the probation bond under Section 1 of the Probation of Offenders Act 1907 could not be so activated as the statute itself prohibited such order of the court. In contrast, the suspended sentence is unregulated as to the time limits for activation.[126] However, the *McManus* case gave some direction on the issue of time and the activation of a suspended sentence. Firstly, Dunne J. pointed to the "self evident" point that the alleged breach must occur within the period of the bond itself. Thus, no liability for breach may arise in respect

125 Order 25 Rule 4 of the District Court Rules 1997 would allow a warrant to issue for a period of six months after the period fixed for the fulfilment of a condition of a suspended sentence. There are no rules of court for the Circuit and Central Criminal Courts to regulate such issues. Perhaps, the District Court jurisdiction is the exception in the circumstances.

126 In the instant case it should be noted that the common law form of sentence was used. However if the statutory form was used there is still a lacuna in the Act relating to the time limits on activation.

of behaviour prior to the offender entering into the bond notwithstanding that a conviction for such behaviour may be secured during the period of the bond. In such cases, the prior behaviour and subsequent conviction must be ignored. Secondly, no liability for breach may accrue for behaviours once the bond has expired. Accordingly, it is important that the period of the bond and the period of suspension (the operative period) are coterminous. The central point in the *McManus* case concerned the capacity of the court to reactivate the suspended sentence once the operative period had expired but in circumstances where the application to activate was made during the currency of the bond. On this Dunne J. concluded;

> "Without going through an exhaustive list of circumstances which might give rise to an application to activate suspended sentences outside the period of the bond it does seem to me that there are circumstances in which such a course may be permissible and it is clear that in the case of the District Court, the Rules of the District Court recognise such a possibility. Given that there are a number of other circumstances which in my view would justify the imposition of a suspended sentence outside the period of the bond I have come to the conclusion that there is no hard and fast rule to the effect that a suspended sentence cannot be activated outside of the period of the bond." (Dunne J., Mark McManus -v- Judge O'Sullivan and the D.P.P., unreported 5th March 2007 p8.)

Significantly, counsel for the D.P.P. in *McManus* conceded that the application for activation had to be brought before the bond itself expired. This concession by the Prosecution however fails to address the issue of possible breaches at the latter end of the operative period where there simply may not be enough time to make an application to the court for breach and activation of sentence.

If, on the other hand, the sentencing court does not utilise a recognisance in structuring the suspended sentence but merely suspends the sentence of imprisonment for a period of say two years, on condition the offender does not receive a further conviction within that period, it is open to the Prosecution to seek activation of the suspended sentence when the period of two years has expired, if the offender receives a further conviction on the last day of the two year period. A subsequent conviction in this case is a matter which is recorded within the operative period and is not dependent upon the time limits of the recognisance. On this issue, O'Siochain has stated "at the end of the specified period, if the recognisance

is kept, there is a complete discharge" (O'Siochain 1977:27). Is it correct to conclude from that observation that if a recognisance is not kept for the entire period, or a condition is breached, such as a further conviction received by the offender, there is not a discharge and the offender is still open to sanction once the operative period has expired? While this procedural question has not been addressed within the Irish criminal courts, the matter was addressed in Section 50(2) of the Criminal Justice Bill, 1967 as follows:

> Where a sentence has remained suspended under this Section for three years, it shall cease to be enforceable except in the event of a breach during the period of the condition subject to which it was suspended.

The sub-section sought to address two time related issues. Firstly, while the period of suspension might validly be made for a period in excess of three years by a court, the sentence would be unenforceable for breaches committed on the expiration of three years. Secondly, the sentence could be enforced after three years had expired provided the breach had occurred within the three year period. As noted, this Section was not enacted into law and the question of enforceability outside of the period of suspension remains unclear. In the interviews with judges it was speculated that Irish sentencers might be minded when structuring the period of suspension to allow a long period of time to elapse before the offender is finally discharged from conditions of the suspended sentence to circumvent such and other difficulties. However, this may give rise to inflation of the sentence by extending the operative period.

One judge of the Circuit Criminal Court confirmed this tendency when he explained why he suspended a sentence for a longer period than the custodial sentence as follows:

> "A longer period I would have no difficulty…even yesterday at a District Court appeal, a prison sentence of 3 months had been imposed in the District Court and I increased it to 6 months on appeal but suspended it on condition I think for 2 if not 3 years because he was a young man and he said that he would never do it again… I think if he is going to misbehave, it could happen anytime within a period of 2 to 3 years. Experience has shown me even greater periods…I looked to the future and had been told that this man was willing to pull himself together. So therefore, I decided alright we will put it to the test, that's the test".A3J1CC

Thus, time issues are a central feature of the suspended sentence. The Superior Courts have signified a reluctance to allow the period of suspension to be in excess of the custodial sentence itself on the grounds that the offender would be called upon to serve the full custodial term if the sentence is to be activated and should not accordingly be exposed to any further risk. However, the new statutory suspended sentence under Section 99(10) now allows for the imposition of a lesser sentence upon breach thus circumscribing the strictures of the *Ian Stewart* decision. It is arguable that this may allow for a more flexible approach which permits trial courts to extend the operative period beyond the custodial period. Statutory suspended sentences in other jurisdictions have a similar discretionary activation section compared with Section 99(10) but more importantly such regimes specifically allow for the suspension to endure in excess of the period of the custodial sentence. The judges who were interviewed, save one, did not apprehend any great difficulty in extending the operative period beyond the custodial period, but were mindful that the period should be proportionate at all times. In particular, the District Court maximum sentencing jurisdiction was referred to as an appropriate operational period for that jurisdiction even for short sentences. Meanwhile sentences for indictable offences were considered in a different light. In such cases the judges believed that the period of suspension should not be overly long having regard to the sentence itself imposed e.g. 2 years suspended for 3 years.

Finally, the time is truly of the essence when the issues of breach and the activation of the suspended sentence are concerned. The breach of the bond which binds the offender must occur within the period and not before or after it. Secondly, any application for breach must be made during the period of the bond itself.

(iv) The conditionality of the sanction.

A sentence of imprisonment should never be suspended *in toto*. The suspension is always conditional upon the convicted person performing obligations required of him/her and these are recited as specific conditions in the recognisance. In the District Court where up to recently no bond was called for, such conditions were specified in the sentence itself. The conditionality of the sanction is a central feature of the disposal. Conditions may be attached to a suspended sentence which have as their purpose the avoidance of real custody or the future control of the offender's behaviour, as noted. Some conditions may be of a mandatory character such as the payment of compensation or attendance at a drug treatment centre. Other conditions may be of a prohibitory

nature such as conditions prohibiting contact with certain persons or the commission of certain offences.

Generally, the judges in the survey considered the imposition of conditions as the central feature of the suspended sentence. Previously, some of the courts imposed suspended sentences unconditionally. This practice was criticised in the Court of Criminal Appeal but at the time of the survey some of the judges expressed a view that an unconditional suspended sentence could still be made. One Judge put it thus :

> "That depends on the facts of the particular case. If I find reason to impose a condition I would have no tolerance in relation to any breach of that condition."A9J1HC

While another judge who considered the imposition of conditions as important did allow for an unconditional suspension when he said :

> "I think they are vital. I think a suspended sentence *per se* you probably only use it in the case of somebody who has generally behaved themselves and this is a one off crime, not likely to re-offend according to the Guards, no previous history. But a sentence subject to conditions which would be the more normal suspended sentence, would be for somebody who requires supervision and that would be the vital part."A5J1CC

But his colleague in the Circuit Criminal Court disagreed:

> "Well, I think the day of the unconditional suspended sentences rather than to be of good behaviour is gone because it has to be tied into the drug thing. You have to attach those conditions." A7J2CC

Another colleague also highlighted the move towards the standard use of conditions when she referred to the necessity to include supervision by the Probation Service as a condition of a suspended sentence to monitor an offender with drug addiction. While the use of conditions was considered important, some of the judges regarded conditions of a

generalised nature sufficient for the task. In contrast, others viewed conditions as serving quite specific objectives. An example of the former is :

> "…I would have to take the view that by and large I don't put many conditions unless the circumstances of a specific case required…the standard condition to keep the peace and be of good behaviour I would rarely go beyond that." A6J1DC

Examples of the latter include:

> "(I attach) huge importance because thoughtful conditions can improve other parties, third parties' lives and society at large rather than what used to happen previously suspended, and walking away. I think that it is an extraordinary useful tool and acquires great thought, and in my view, suggestions from all parties in some cases as to what those conditions should be i.e. in terms of what a person should do and shouldn't do in the course of the suspension, and what will trigger the sentence itself…a lot of time should go into the conditions appropriate or what will trigger the sentence in the end." A4J1DC

> "I wouldn't dream of suspending either in whole or in part without very strict conditions…one of the conditions would be that the person remains under the supervision of the Probation Service, invariably so."A7J1CC

When the conditions imposed are narrowly focused, some of the Judges identified the problem of making some condition of compliance too onerous for the offender. The concerns expressed by these judges touched upon the ability of the particular offender to reasonably remain compliant having regard to his/her particular characteristics as well as the shortcomings of therapeutic interventions when they stated:

> "I am not a great believer in giving a suspended sentence on the basis that if the person abstained from alcohol for a period of 12 months or abstained from drugs for a period of 12 months. I am not condoning it, but I actually think the practical pragmatic follow up on this is next nigh impossible depending on the individual…I actually think that is not helpful. I would be more interested in getting that person in touch with the Probation Service firstly with a view to them pointing that person in the direction to try and get help."A6J1DC

> "I think that if the condition is to take medical treatment or to attend a particular facility that has to be enforced. But I think every medical system will have its rate of failures and I think that has to be understood as well. There are reasons, as I think most of the doctors would confer, there are reasons why treatment fails, for instance a failure to get the substance precisely calibrated". A8J1SC.

Both O'Malley (2000:291) and Osborough (1982:229) refer to the unfettered discretion of the Irish courts to fashion conditions to suit the circumstances of the occasion. However, once a court attaches a condition to a suspended sentence, whether mandatory or prohibitory, unless the court exercises supervision of the sanction by way of reviews or by engaging the offender under a probation-type bond, the non-fulfilment of such conditions are generally unknown to the court unless a case is re-entered by the prosecution for breach and activation of sentence.

When interviewed on the issue of compliance with conditions of a suspended sentence, the judges tended to divide into separate camps. The judges exercising summary jurisdiction only were strongly of the view that non-compliance with conditions of a suspended sentence did not of itself cause such cases to be re-entered for consideration of revocation. The following is a selection of their responses:

> "…up to now the Guards never reactivated them…"A1J4DC

> "…you may have wanted it to work, but it did not. The administrative side of it did not." A1J5DC

> "I haven't the slightest doubt that they (prosecution) are not concerned about it; that once a case has been dealt with even if a suspended sentence is imposed, that the prosecution in the District Court in particular are not interested if the Defendant was convicted somewhere else, to bring the case back. Whether it is fair to say that they are not interested or not, or whether they simply do not have the resources to find out and heretofore there has been no official or no provision in either the Rules or otherwise as to how the matter can be brought back before the court. I think that may be the reason for it, but certainly my experience has

been that few if any of the cases where I have imposed suspended sentences has ever been brought back before me and I do not believe it to be because all of them have achieved their purpose." A2J1DC

The judges exercising indictable jurisdiction could be divided into 2 distinct groups: the "believers" and the "non-believers". Of those who believed that the conditions were complied with, one judge of the Circuit Criminal Court stated:

"The re-entries as against the amount of suspended or partially suspended sentences – the amount of re-entries is small… you would have to say that it must work". A7J1CC.

While other judges of the Circuit Criminal Court based their views more on an expectation:

"I would hope that the powers that be, the Gardai, would bring (the offender) back promptly…I think the Guards are very fair and very often I think they may well close a blind eye to a fellow who has done something…I would certainly say that where there is anything untoward going on by someone who has had the benefit of a part suspended sentence, the Gardai do bring it back". A3J1CC.

"I would expect the prosecuting authority to bring the accused before me in the event of the slightest breach. I think they know that I expect that and I would regard it as misconduct on their part." A9J1HC

The other group expressed scepticism that breach of conditions of a suspended sentence would come to the notice of the court through breach of procedures:

"Unfortunately, I am around long enough to have my doubts." A5J1CC

"Well how would you know? I think that is the real question…if it is going to be used it should be taken seriously and reactivated when called upon. For many years when I was practising it was a complete joke because nobody ever reactivated it." A8J1SC

Thus it may be observed that the District Court bench is sceptical about the level of compliance with conditions attached to a suspended sentence, meanwhile in the courts which dealt with indictable offences the views expressed were optimistic as well as pessimistic depending upon the judge interviewed.

Increasingly, the Circuit Criminal Court has made use of the judicially developed "adjourned supervision" by the Probation Service as a condition to be attached to a deferral of penalty. By using this devise, which has no basis under the Probation of Offenders Act 1907, the court is enabled to monitor through a professional criminal justice agency the behaviour of a convicted person pending final disposal of the case by way of sentence. An example of this procedure might include an adjournment of penalty to ensure a convicted person attends at a drug treatment centre and achieves a certain level of stability before the court might dispose of the case finally. On the return date it is not at all unusual, if the report of the offender is favourable, for the court to impose a suspended sentence with a condition that the offender takes continuing advice and remains under the supervision of the Probation Service for the period of the suspension of the sentence. This term is usually specifically recited as a condition in the recognisance entered into. It is important to note that the offender in these circumstances is not placed "on probation". He/she is not conditionally discharged but is actually sentenced to a term of imprisonment the suspension of which is supervised by a probation officer. Sometimes this procedure is put in place without any prior adjournment of penalty as set out above where the court simply places the offender on a suspended sentence during which period the offender is supervised by a probation officer. Usually, however such a sentence is preceded by a report from the Probation Service on issues raised at the original sentencing hearing. Under Section 99 of the Criminal Justice Act 2006 the Oireachtas has made provision for the Probation Service to be formally inducted into the procedures attached to a suspended sentence but such changes may challenge the identity of the probation officer as a friend of the accused (fully discussed in chapter 7). For the moment, it is sufficient to highlight the difficulties which the current procedures present when such conditions are attached to a suspended sentence. If a client/offender is given a suspended sentence and placed under continuing supervision by the Probation Service, what are the limits of discretion, if any, which the probation officer is allowed before she/he is obliged to seek re-entry of the case? What is the *locus standi* of the probation officer as complainant for any breach or is this function solely a matter for the Prosecution? Does the probation officer have a

reporting function to inform the Prosecution of any breach of the suspended sentence? Unlike the Butler Order, the straightforward suspended sentence is not subject to review. If conditions are breached, the court will not know about this unless the matter is re-entered by way of breach proceedings.

The conditional nature of the suspension of the sentence of imprisonment, it is argued, is an essential tenet of the sanction. The requirement of the convicted person to observe the conditions of the suspended is prospective in character. The sentencing court's intention to control the future behaviour of the convicted person, who remains under threat of imprisonment for breach, finds its nexus in the declared and acknowledged obligation of the convicted person to comply with those conditions.

What might happen if a sentencing court suspended a sentence unconditionally? The writer is aware of the making of such disposals where a court suspends a term of imprisonment for a defined period of time but does not oblige the convicted person to enter into any recognisance to keep the peace or to be of good behaviour or to be bound by any other condition. In the case of People (DPP) –v- Martin Byrne, Keane C. J. observed:

> "… the Court would observe … that it would deprecate a practice which appears to be adopted on occasions in the Central Criminal Court and is obviously on occasion also in the Circuit Criminal Court of suspending unconditionally the last six months of a sentence because that is really … reducing the sentence by that period". (Keane C. J., People (DPP) –v- Martin Byrne Court of Criminal Appeal ex tempore 19th of January, 2004).

It is argued here that such sentences which are unconditional, superficially retain the character of a suspended sentence because a custodial sentence has been imposed which is then suspended for a definite period of time. However, as such sentence is incapable of activation on the grounds that no breach of any condition may possibly be committed, the sentence might be considered a nullity. Indeed this seems to be the observation of Keane C. J. in the *Martin Byrne* case above. This is especially so in light of the claim that the suspended sentence is essentially a device to control the future behaviour of the convicted person. At another level, such a sentence ironically answers the criterion of avoidance of

custody as a primary aim of the sentence. Perhaps these idiosyncratic forms of suspended sentence also highlight another aspect of the sentencing function, namely the symbolic passing of a custodial sentence for serious wrongs committed by the convicted person, albeit in reality such a sentence might also be characterised as a complete "let off" for the same wrongs done.

A suspended sentence which does not contain conditions or obligations to be performed by the convicted person is incapable of activation. A suspended sentence structured without conditions departs from a fundamental feature of the suspended sentence, namely the future control or change of behaviour of the convicted person.

Take the next boat to England A condition of the Suspended Sentence

Before the admission of Ireland to the European Economic Community on 1st January 1973 it was not uncommon for the courts to impose a sentence of imprisonment which would then be suspended provided the convicted person left the jurisdiction immediately or within days of the court order. Such an approach to sentencing was tantamount to "dumping" Irish social problems on neighbouring jurisdictions such as Britain (Russell 1964, Ryan 1990). Besides the severe economic and social factors which favoured significant emigration from Ireland to Britain in the 1950s there is a strong suspicion that certain sentencing practices by the courts may have played some role in divesting the State of "undesirables" or persons convicted of criminal offences.

Russell (1964) asserts that Ireland was relatively crime free for serious offences in the 1950s suggesting as a possible reason:

> "…an Irishman with criminal aspirations almost invariably leaves this country and goes to England, sometimes voluntarily, sometimes on the advice of the police, or even of a District Justice." (Russell 1964:146).

Undoubtedly, a significant number of offenders emigrated to Britain during this period thus giving the impression that the use of incarceration was in decline which in absolute terms in respect of imprisonment it was (Kilcommins *et al* 2004). While the Statistical Abstract for 1956 (CSO 1956) shows historically low levels of imprisonment in Ireland at 373 prisoners, Kilcommins *et al* caution against being lulled into believing the level of incarceration was particularly low when they demonstrate the use of numerous other

concomitant carcerative procedures, not directly linked to the criminal justice system, such as industrial schools and mental hospitals (Kilcommins *et al* 2004:74-75). Meanwhile across the Irish sea the newly arrived immigrants showed a distinctive presence in the criminal justice system in Britain. In this regard O'Connor states:

> "Between 1950 and 1961 the contribution of the Irish to violent crime in London rose from 9.7% to 12.2% yet they formed only 2-3% of the population of the metropolis. In the same decade, Irish-born from the Republic accounted for 12% of the prison population of England and Wales and Scotland yet only 2% of the total population were Irish-born" (O'Connor 1972:137).

Kilcommins *et al* estimate that in 1960, nearly 3,000 Irish-born males were imprisoned in English and Welsh prisons compared to 1,700 comparable committals to Irish prisons (Kilcommins et al 2004:63, Ryan L. 1990).

By way of further illustration of the transference of Irish social problems to Britain, in a survey of adult males convicted of robberies in London in 1950 and 1957 it emerged that 7% were Irish-born in 1950 and this rose to 20% in 1957 notwithstanding the fact that the same category of adult males born in the Republic of Ireland amounted to only 2% of the population of the city of London for the same period (McClintock and Gibson 1961).

While no reliable data are available to substantiate the claim that the courts pursued the policy of enforced "transportation" by obliging an accused person on pain of incarceration to "take the boat" to England, the frequency of offending and the significant application of custodial sentences for convicted Irish offenders tentatively suggests either a upsurge in offending on the part of such immigrants once they had landed in Britain or alternatively a continuation of offending behaviour by the same cohort who had avoided either prosecutions or penalties by leaving the jurisdiction of Ireland. The explanation might also be found in Russell's suggestion that serious offending commenced only upon arrival in Britain. In seeking an explanation to the significant increase in convictions by Irish immigrants to Britain one needs to have regard also to sentencing practices in the magistrates and the county courts specifically towards Irish immigrants who fell foul of the law during this period.

Whatever conclusions can be drawn from the above discussion, what is clear is that the issue was deemed sufficiently serious by the Oireachtas to warrant a prohibition of such practice in the Criminal Justice Bill 1967.

The 1967 Criminal Justice Bill sought to deal with this practice of forced migration by prohibiting the inclusion of such conditions in any order of a suspended sentence as follows:

> Section 50(1)(a)
> The court shall, subject to Section 49(4)(b) of this Act have power to suspend the sentence or fine on such conditions (**other than a condition restricting the person's choice of country of residence**) as it thinks proper, (Criminal Justice Bill 1967, writer's emphasis added).

However, the practices which the Bill sought to prohibit seem to have fallen into disuse particularly in relation to Irish offenders in the intervening period. Meanwhile, and particularly since the 1990s, Ireland had experienced net immigration each year.[127] During this period the Court of Criminal Appeal addressed the issue whether a sentencing judge could impose a condition that an accused, who had little or no connection with Ireland, might be properly obliged as a condition of a suspended sentence, to leave the jurisdiction. The Court of Criminal Appeal answered this in the affirmative.

Section 50 of the Criminal Justice Bill was never enacted, but matters relating to this were central to the case of People (DPP) –v- Alexiou [2003] 3 IR 513. In that case the facts were such that the convicted person had no prior contact with this jurisdiction and had indicated a desire to return to his home country of South Africa immediately upon release from custody. The Court of Criminal Appeal approved the sentence of the Circuit Criminal Court but observed that a time limit on the prohibition of further entry into the state should have been specified rather than allowing the condition to continue in perpetuity.

127 An overall population growth of 20% and every 1 in 10 workers is foreign born. (Principle Demographic Results, Central Statistics Office, June 2003 available at Internet)

Thus, the previous practice which obliged such offenders to leave the jurisdiction has a certain contemporary resonance when the disposal of certain cases is considered, especially when the offender has no real connection with the Irish jurisdiction.

However, as the suspended sentence at common law is unregulated by statute, conditions may occasionally be placed upon a convicted person which overreach the principle of proportionality, an example of which is the requirement to leave the jurisdiction within a specified time where the accused is either an Irish citizen, an E.U. national or has otherwise a right of residency in the State (People (D.P.P.) –v – Alexiou [2003] 3IR 518). In the case of People (D.P.P.) –v – Salman Aslam Dar, in an appeal against leniency brought by the D.P.P. for a series of three rapes, the Court of Criminal Appeal (14th February 2006, p 4 Bailii) in substituting three sentences of five years each to run consecutively which were imposed by the Circuit Criminal Court, gave ten years for the first rape, twelve years for the second rape and 15 years for the third rape, all of which sentences were to run concurrently. Significantly Kearns J., the presiding judge, intimated that but for Dar's counsel giving an unqualified undertaking that his client would return to Pakistan when his term of imprisonment was over, the sentence would have been increased.[128] In People (D.P.P.) –v – Alexiou [2003] 3IR 513 a similar consideration applied but the entire period of custody was completely suspended on the undertaking of the accused to leave the State immediately.[129]

A sentence of imprisonment suspended on condition that the accused leaves the State forthwith or upon the conclusion of a shorter custodial sentence (part suspended sentence) is essentially a crime reduction measure which may offend against one of the principles of proportionality that crimes of equal seriousness should be punished equally.[130]

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128 In the instant case the accused, Mr. Dar was a computer science student from Lahore Pakistan. (Irish Times, February 14th 2006, p.4). In D.P.P. –v – Dar the court considered and yielded to submissions by counsel in mitigation that the period in custody would not be increased provided the accused left the jurisdiction immediately upon completion of sentence.

129 In People (D.P.P.) – v – Alexiou [2003] 3 I.R. 513 the D.P.P. appealed the original sentence on the grounds of undue leniency and more particularly that the accused would not be amenable to revocation or breach proceedings if he was out of the jurisdiction. O'Malley (2000:292) has characterised the suspended sentence as a real punishment because it carries both a term of imprisonment and the possibility of activation for breach of conditions. If the possibility of activation is removed by obliging the offender to leave the jurisdiction, the sanction not only loses its bite but is also significantly altered in character. While the accused is prohibited from re-entry to the State on pain of activation of the sentence, if the accused is not of good behaviour while abroad s/he is not capable of any sanction for breach.

130 None of the Judges interviewed adverted to the condition that an offender might be obliged to leave the jurisdiction. One Judge did suggest to the writer when this matter was raised at a conference in 2007, that the judge might indicate s/he was not going to sign the warrant of committal to prison for a specified number of days. By this device, a convicted person would be allowed walk free on the date of sentence and leave the jurisdiction. If s/he was available to be lodged in prison after the signing of the warrant of committal, s/he would not have taken up the opportunity to avoid custody by simply leaving the

(v) The role of consent.

In the classical suspended sentence and particularly the form of suspended sentence which was developed originally in the criminal courts in Ireland, a convicted person was always required as a condition of suspension of the sentence to enter into a bond or recognisance to keep the peace and to come up for sentencing when called upon to do so (Osborough 1982:222). [131]

The requirement to enter into a bond is a condition precedent to the suspension of a sentence of imprisonment. A recognisance to keep the peace is a contract of record between the court and the convicted person secured by a promise on his/her part to pay a specified sum known as a surety if there is failure to fulfil a condition of the bond (Sandes 1939:167). Thus, consent of the convicted person is essential before s/he may be bound over on a bond to keep the peace and to come up for sentence if called upon to do so. The tendering of such consent is consistent with the voluntary nature of the requirement that the convicted person may have to comply with conditions which are essentially motivational in character. These may include *inter alia* a requirement to co-operate and take advice from the Probation Officer, the attendance at a drugs/alcohol treatment programme, the payment of compensation, or the avoidance of contact with injured parties. The contractual nature of the recognisance or bond promotes the participatory requirement of the convicted person to fulfil his/her obligation pursuant to the bond, albeit the recognisance is underwritten by the threat of activation of the custodial sentence which is conditionally suspended.

The formal entry by the convicted person into a recognisance also represents a clear record of the "sentencing event" where the court actively communicated with the offender (Thomas 1970) in the disposal of the case. However, in contrast with the passive communication between the court and the prisoner who is given a custodial sentence and is removed to prison, in the case of the suspended sentence secured by a recognisance, the prisoner undertakes a commitment into the future to fulfil conditions attached to his/her recognisance. The obligation to remain compliant endures over time and this is acknowledged by the convicted person.

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jurisdiction. In Tralee, Co. Kerry, in 2007 a District Court Judge sought to impose a condition upon an offender that the offender leave the jurisdiction as a condition of a suspended sentence. The offender had very recently arrived in Ireland from Poland. Interestingly, the accused through his Solicitor, told the court he did not wish to leave the jurisdiction and further indicated he wished to appeal. The matter ended there.

131 Section 99 Criminal Justice Act, 2006 makes similar provisions.

Unlike the formal consent of the convicted person which is required under Section 4(1)(b) of the Criminal Justice (Community Service) Act, 1983 before a court may impose a community service order upon him/her, such consent is not required under the judge made procedure before a suspended sentence may be imposed, unless the court specifies that a formal bond to secure such suspension is required. As previously observed this is not always the case.

Up until recently, District Court Judges when constructing suspended sentences have tended to abandon the use of any requirement to enter into a bond to keep the peace or to promise to pay sureties, thereby removing the element of formal consent in the making of the suspended sentence in the District Court. Instead, some District Court Judges merely recited that the accused was sentenced to X months imprisonment but the warrant shall not issue provided the defendant keeps the peace and is not further convicted for an offence within a specified period of time. Although the consensual element is removed, a clear custodial sentence has been pronounced in the order and the conditions for its non-activation are equally set out. Although Rottman and Tormey (1985:216) have preferred to characterise this procedure as a deferment of sentence, such sentence has all the hallmarks of a suspended sentence except for the requirement for the convicted person to enter into a formal bond to keep the peace. An order that the warrant is not to issue provided that the convicted person is not further convicted within a specified period, where the custodial period has been specified in the order, is much more closely related to the classical suspended sentence rather than the type of deferred sentence referred to in this chapter where the ultimate penalty is unspecified until the final disposal of the case.

Thus the use of this form of hybrid suspended sentence by some District Court judges removes all trace of the consent element from the disposition. What remains is still a suspended sentence recited in open court and recorded as such, but the convicted person is not allowed the same formal degree of participation which is provided if s/he enters into a formal bond. However, it is customary for a District Court judge when imposing a suspended sentence to directly address the convicted person and to specify to him/her the conditions which are required to be fulfilled if the custodial sentence is not to be activated. The degree of participation by the convicted person in this exercise may be either non-existent or s/he may acknowledge his/her obligations pursuant to the conditional

sentence. Thus, the degree to which the sentence may be characterised as participatory and communicative will vary from court to court depending on the manner in which the sentencing judge deals with the accused either by way of a formal bond or a spoken communication.

Thus, while a formal consent is required before a court may make a community service order, a formal consent is not required for each category of suspended sentence, except for a suspended sentence under Sec. 99 Criminal Justice Act 2006. In particular a suspended sentence in the District Court where no recognisance is used completely obscures any element of consent. But the performance of conditions attached to a suspended sentence is essentially prospective in character. Accordingly, the giving of consent by an offender by entering into a recognisance might be seen as only an initial but static feature of the process. In contrast, the continuous compliance by an offender over the operative period must be seen as a dynamic rendition of the same consent. The distinction is important because a consent to abide by conditions of a suspended sentence must endure for the period of the suspension and must not be seen to evaporate on the signing of the recognisance. Arguably, the success of a suspended sentence as a crime prevention instrument may be measured by the degree to which the offender regards him/herself bound by the original consent given in the recognisance or by the rapidity by which s/he resiles from such consent.

In summary, the suspended sentence has been described by O'Flaherty J. as "a very beneficial jurisdiction for Judges to possess" (O'Brien –v- Governor of Limerick Prison 1997 supra) but the benefit of such jurisdiction, it is argued, must be seen to diminish in almost direct proportion to the failure of the offender to comply with such conditions where such breaches are unknown to the court.

In this section it has been shown how the suspended sentence is triangulated on three key elements. The first time component is the actual sentence of imprisonment and the second time component is the period of suspension. As noted the period of suspension is unregulated but the practice of suspending the sentence for a long period may find its origins in judicial attitudes where a long period of compliance is required of the offender. The final component of the sanction, namely the conditions invest the penalty with a distinctly prospective purpose but the particular efficacy of each individual suspended

sentence can only be measured on the rate or degree of compliance by the offender with the particular conditions attached to his/her sentence. A sentencing court may intend a certain change of behaviour to be brought about in the offender by structuring the suspended sentence in a certain way tailored to the offender's circumstances and the offence. However, if the conditions are not complied with, clearly the intended result of the sentence is not achieved.

ACTIVATION OF THE SUSPENDED SENTENCE

A suspended sentence needs to be conditionally suspended, otherwise it is incapable of re-activation. Such conditionality of suspension may be contained in either a recognisance entered into by the convicted person or in the spoken order of the court where the court does not require the convicted person to enter into such a recognisance. Conditions of a mandatory or prohibitory nature are an essential feature of the suspended sentence. While the issue of identifying which particular agency within the criminal justice system has the function of monitoring offenders, who are subject to suspended sentences, will be addressed in the next section, this section will address the procedures for activating the suspended sentence when breaches of the conditions occur. While some writers suggest that breach of conditions of a suspended sentence will automatically re-activate the sentence without the need for any further order, it will be demonstrated how procedures, rules of Court and case law structure the requirements for a valid re-activation of the sentence. An important aspect of the re-activation process involves the degree of discretion allowed to sentencers to invoke the full penalty or a lesser penalty in substitution. This discretion, when examined, will also disclose a discretion to ignore trivial breaches and to allow the suspended sentence to remain *in situ*. Another related issue on activation concerns the standard of proof and the degree of breach necessary to warrant the re-activation of the suspended sentence. This will also be addressed in this section.

In Ireland there is no reliable information on the rate of breaches and re-activation of the suspended sentence. There does however appear to be a reluctance by sentencers to re-activate or breach an offender for non-compliance with conditions attached to a suspended sentence, even when subsequent convictions are recorded against the offender. However, in the neighbouring jurisdiction of England and Wales Sparks estimated the reactivation

rate of suspended sentences to be 35% (Sparks 1971:391) and Bottoms estimated the figure to be 30% (Bottoms 1987:189).

The essential criticism of the suspended sentence by the Committee of Enquiry into the Penal System (Whitaker 1985), besides its lack of clear status, related to the absence of any mechanism to cause the case to be re-entered automatically when the conditions of compliance contained in the order are breached. Additionally, they criticised the procedural rule that a warrant of execution could not issue in respect of a suspended sentence in the District Court at any time after six months of the making of the original order (District Court Rules 1948, Rule 68). The Committee concluded that if these two defects were removed, the penalty might be more acceptable to the judiciary and more obviously a penalty to those on whom it is imposed (Whitaker 1985:5.9). The latter "defect" contained within the 1948 District Court Rules has been addressed in the 1997 District Court Rules.[132]

In this section the following issues will be specifically addressed to elucidate how the reactivation of the suspended sentence operates: the application to breach, the estreatment of the bond and the relevance of such a procedure, the order for breach and the activation of the sentence, the pivotal role of the prosecution in the activation process and finally issues relating to the activation of the part suspended sentence.

(i) The application to activate the sentence.

In conformity with principles of natural justice and constitutional justice, a suspended sentence should never be activated by a court unless the convicted person has had prior notice of the intention of the prosecution to seek activation of the custodial sentence. The convicted person should be allowed to show cause why such sentence should not be activated and should be further allowed to show cause through a lawyer and if necessary such lawyer should be paid for under the Legal Aid Scheme. This might be described as a modern statement of the law relating to an application to activate a suspended sentence. Historically, the procedure for the activation of a suspended sentence may not have proceeded with such conscious regard to the rights of the convicted person when activation of the sentence took place. It is not possible to state with precision the rules

132 This allows the extension of the time limit on the issuance of a Warrant in the District Court to include any period fixed for the fulfilment of a condition contained in the Order of suspended sentence. Thus a suspended sentence created after 1997, if constructed in such a way as to specify the period for the fulfilment of a condition, can have the effect of extending the period for the fulfilment of the condition to the entirety of the operative period of the Order.

governing the activation of suspended sentences at common law (O'Malley 2006:461) as these do not have statutory prescription. For the sake of clarity, the discussion on the activation of the suspended sentence might usefully be divided into two distinct analyses. Firstly, the procedural rules developed to date to bring the convicted person back before the court will be discussed and then a separate analysis of the criteria necessary for the activation of a sentence of imprisonment will be presented.

Heretofore, there appears to have been some confusion in the literature as to which precise aspect of activation is under discussion at any one time. O'Malley usefully observes: "a Judge may undoubtedly activate a suspended sentence when an application is made and credible evidence is given of a breach of one or more of the conditions of suspension" (O'Malley 2006:461). Perhaps the statement could be further qualified by stating that the application is made to the court on notice to the accused to show cause why the sentence of imprisonment should not be invoked. Presently it will be demonstrated that activation of a suspended sentence does not automatically follow upon a proven breach of a condition attached to a suspended sentence. But before a court is requested by the prosecution to activate a suspended sentence, certain procedural requirements must be fulfilled. Some commentators have observed that a breach of a recognisance automatically activates the sentence of imprisonment (Ryan and Magee 1983:401; Walsh 2002:1033) without stipulating whether such activation occurs at the conclusion of a hearing upon notice to the convicted person to answer for the alleged breach or by some other mechanism.

Ryan and Magee suggest a self activating mechanism:

> "… if the offender is in breach of his recognisance, then the sentence comes into full operation without any further Order." (Ryan and Magee1983:401).

And Walsh reports:

> "… if the offender breaches his/her recognisance, then the sentence comes into full operation without the need for any further Order." (Walsh 2002:1033).

The authority quoted by the above writers is the English case of The King –v- Spratling [1910] 1 K.B. 77 where the Court of Appeal had to deal with the issue of the Court of Quarter Sessions utilising section 1(2) of the Probation of Offenders Act, 1907 (legislation, common to both jurisdictions at the time) in the disposal of an indictable offence which

category of offence was not provided for in the relevant section. The Court of Criminal Appeal, in deciding the case, reiterated that a Court of Quarter Session has always possessed, as an incident of its jurisdiction, inherent power to postpone judgement of sentence. However, the *Spratling* case does not appear to be direct authority for the proposition that if the offender breaches his recognisance, the sentence comes into full operation without the need for any further order. Otherwise, a person on a suspended sentence, who is subsequently convicted for a further offence, would automatically have the original sentence imposed upon him/her, without being called upon in a formal manner to show cause why such original sentence should not be imposed. However, there is an historical basis for the claim to automatic reactivation of a suspended sentence in respect of cases of summary jurisdiction.[133]

In recognition of the due process procedures required before a suspended sentence can be reactivated, the District Court Rules, 1997 provide the following in the form which is to issue in the event of an activation:

> That the accused has been brought before the Court and that the Court is satisfied of the failure to carry out the terms upon which the said sentence was suspended and now directs that the Warrant do issue (District Court Rules, 1997 Form 25.8).[134]

And Order 25 Rule 3 provides:

> "Where the Court, upon imposing a sentence of imprisonment, conditionally suspends the execution thereof, it may, upon the application of the Prosecutor, issue a Warrant of Committal, on being satisfied of the failure of the accused to comply with the terms upon which the said sentence was suspended."

While the phrase "on being satisfied of the failure of the accused" does not necessarily imply that the accused has been given notification of the details of the alleged breach and a

133 Order 68(2) of the District Court rules, 1948 provided: "…when the imprisonment is to take place on the non-performance of a condition or where the execution of the sentence of imprisonment has been suspended by the Justice, the Justice shall issue the Warrant of Committal upon his being satisfied of the non-performance of the condition or of the failure of the Defendant to carry out the terms upon which the sentence was suspended and it shall not be necessary in any such case to serve upon the Defendant any notice of an application for the issue of the Warrant". (District Court rules, 1948 Rule 68(2).

134 Although prior notice is not specified in the District Court Rules 1997, in light of the dicta of Geoghegan J. in Brennan – v – Windle and Murphy, the D.P.P. and the Attorney General, Supreme Court 31st July 2003 the application of this rule without notification must be considered questionable.

full opportunity to challenge the allegation, it is argued here that any breach of proceedings which sought to ignore these important features would be defective and open to challenge by way of judicial review.[135]

In a case where an offender, the subject of a Circuit Criminal Court sentence, appeared before the same Court on a District Court Appeal against conviction and severity, the Circuit Court activated the suspended sentence on affirming the District Court Appeal there and then and without prior notice to the unsuccessful appellant. This procedural short cut was struck down by Order of *certiorari* by Doyle J. In Re Pratt (Irish Times 2nd of May, 1978) on the grounds that the accused should have been afforded prior notice of the court's intention to hear an application for activation of the sentence which was denied him. A more recent case from the Supreme Court is quite instructive on the dangers of proceeding with a criminal case in the absence of the accused and without securing his/her presence before the court. In Edward Brennan -v- Judge Desmond Windle, Judge Catherine Murphy, the D.P.P., Ireland and the Attorney General, Supreme Court, 31st July, 2003 Geoghegan J. observed:

> "Once the Judge would have in mind to impose a prison sentence and particularly a sentence as long as four months and particularly also in the circumstances that the offence in question would not invariably attract a prison sentence, the first named respondent failed in my opinion to afford the application due process and/or fair procedures or natural/constitutional justice" (Brennan –v- Windle & Others, Geoghegan J. Supreme Court 31st day of July, 2003, Bailii, I.E.S.C.)

In practice, informal rules apply when an application is made by the prosecution for the activation of a suspended sentence. In each court jurisdiction the Prosecution requests the court to revoke the suspended sentence on an application made on notice to the accused. If the accused fails to present himself/herself in Court on the date of the application and the court is satisfied that the convicted person has received notice of the application, the court usually issues a warrant for the arrest of the convicted person rather than proceeding in his/her absence. It must be observed however that this procedure evolved in more recent times. Historically, particularly in the District Court, the court was empowered under the District Court Rules to issue the warrant on uncontested evidence

135 It is suggested that the District Court Rules could be more comprehensive in providing clarity on the issue of notification of the proceedings to the accused even though the form for the execution Warrant does include a recital that notification has been given.

of a breach of a condition. This is no longer permissible under the District Court Rules, 1997 and clearly the dicta from such cases as *Brennan* (supra) and in re *Pratt* (supra) would render proceeding in the absence of the accused or at least without notice to the accused, in any application for revocation of a suspended sentence, a procedure of questionable validity.

Despite the absence of written rules of court providing for an application for the activation of a suspended sentence in the Circuit, Central and Special Criminal Court, the basic requirements for a valid breach application have been set down in a series of cases. In Judicial Review proceedings, Michael Rooney Dignam –v- His Honour Judge Raymond Groarke and the Director of Public Prosecutions (J. R. IEHC 150, 17th November, 2000), the applicant was released "into the custody of the Probation Service on condition that the applicant keep the peace and be of good behaviour for a period of two years". The applicant was sentenced to four years imprisonment on the 17th of November, 1998. The case was reviewed by the first named respondent on the 13th of July, 1999 whereupon the balance of the sentence was suspended as set out above. The second named respondent applied *ex parte* to have the case re-entered on the 28th of September, 1999 on the grounds that the applicant had failed to comply with the conditions of his release, namely to keep the peace and to be of good behaviour. The matter was re-entered on notice to the applicant's Solicitor who appeared with counsel on the 8th of October, 1999 and the first named respondent ordered that the applicant should serve the balance of the four years imposed upon him. The review court enquired into a number of issues, particularly the interpretation of the phrase "to keep the peace and be of good behaviour" and the nature of the proceedings before the first named respondent on the 8th of October, 1999. McCracken J. in dealing with the issues stated:

> "With regard to the second issue, the phrase "keep the peace and be of good behaviour" is one that has been in use for centuries. However, it does not seem to be a phrase which has attracted any statutory or judicial interpretation, perhaps because it means what it says. Mr. Mill-Arden S.C. on behalf of the applicant has strenuously argued that if the applicant is to be shown to be in breach of his condition, it must be shown that in some way he had not complied with the law of the State and further that he had been convicted of a breach of the law before the matter could be re-entered before the Judge who suspended the sentence. In my

view, this argument is not sustainable. A person may not be of good behaviour even though he has not committed a crime, and certainly even though he has not been convicted of a crime. It is not difficult to think of examples such as consistently committing a nuisance to his neighbours, and it is equally easy to think of examples of criminal offences which would not necessarily mean that the person who committed the offence was not of good behaviour as, for example, a parking offence. At the end of the day, it must be a matter for the sentencing Judge in each individual case to decide whether specific behaviour can be said to be a breach of an undertaking to be of good behaviour" (McCracken J. Michael Rooney Dignam –v- Judge Groarke & Others IEHC 150 2000).

On the final issue, on the manner in which the first named respondent dealt with the application to re-activate the suspended sentence, the court noted with approval the judgement of Barron J. in the State (Murphy) –v- Kielt [1984] I.R. 458 and of the Supreme Court in the appeal which followed. In the latter case the convicted person had been given temporary release from St. Patrick's Institution on a number of conditions, one of which required him to keep the peace and be of good behaviour. During the period of temporary release, he was arrested and charged with attempted murder which he denied and was remanded in custody again to St. Patrick's Institution on that charge. While on remand, the Governor of St. Patrick's Institution, purported to terminate the temporary release solely on the grounds of the new and serious charge preferred against the prisoner without further enquiry. Barron J. in the High Court set out the essential requirements before a decision to re-activate the temporary release could be made as follows:

"In my view, the essentials of a valid hearing in the present case require at least:-

1. Evidence from which it would have been fair to hold in favour of the allegation.
2. Notification to the prosecutor (prisoner) of the nature of such evidence sufficient to enable him to prepare a defence.
3. Time for the prosecutor (prisoner) to prepare a defence and for an opportunity to make that defence".

And he went on:

> "Such a hearing should have been held and should have been seen to have been held. Such hearing did not have to be of a very formal nature, provided that the minimum requirement to which I have referred was met … [In] my opinion, the prosecutor (prisoner) was entitled to be judged by the respondent (Prison Governor) but not pre-judged. Since the respondent was not in possession of any evidence from which he could have held that a breach of any conditions to which the prosecutor's release was made subject had occurred, it follows that there could not have been a hearing and accordingly, there could not have been a hearing which followed these procedures". (The State (Michael Murphy) –v- William Kielt [1984] I.R. 466).

In Dignam –v – Groarke and the D.P.P., (17th November, 2000, I.E.H.C., 150, Bailii) McCracken J. applied similar reasoning to the case before him. The original sentencing judge, Judge Groarke, had reactivated the sentence on the testimony of a D/Sgt. Kelly who stated that the accused had been charged with the murder of his brother and was separately charged with the unlawful taking of a motor car contrary to Section 112 of the Road Traffic Act, 1961, since the imposition of the suspended sentence. In the judicial review proceedings, McCracken J. held that in the application to reactivate the suspended sentence, the sentencing judge had not afforded the accused sufficient information or fact upon which to base a cross examination of D/Sgt Kelly in defence of the application.

McCracken J. held that the lawyers acting on behalf of the prisoner

> "… came into Court without an opportunity to investigate the allegation against the applicant, and while they were given an opportunity to cross-examine D/Sgt. Kelly, they have no information or fact upon to base such cross-examination."

And he concluded:

> "… the principles set out by Barron J. above were not complied with to any degree, and the principles of natural justice (and) in fair procedures were not complied with". McCracken J. Dignam –v- Groarke 2000 IEHC 150 17th of November, 2000(p.4.)

Prior to Section 99 of the Criminal Justice Act 2006 coming into force, an application to revoke a suspended sentence was initiated by the prosecution only. A notice to the convicted person and his solicitor on record was served by ordinary pre-paid post that a

formal application would be made on a given date before the court, which originally imposed the suspended sentence, to have such suspension revoked and the custodial sentence imposed. There were no formal rules of court at any procedural level to govern this procedure of notification. If the convicted person failed to appear on the return date, the court could issue a warrant to procure his/her attendance before the court would proceed further with the matter.

Accordingly, any application by the prosecution to revoke the suspension of the term of imprisonment must be on notice to the convicted person. This was not always the case. The convicted person should always be afforded the opportunity of notice both of the application to revoke and also of the grounds upon which such revocation is based.[136] Sufficient time should be afforded to the convicted person to prepare his/her answer to the application and legal aid should be afforded to the convicted person to present his/her defence. In light of these more recently identified requirements, it can be said that there can be no automatic re-entry or revocation of the suspended sentence.

(ii) The breach.

In the preceding section the judicially developed procedures for a valid application to revoke a suspended sentence were set out. But when the convicted person is brought back before the court to answer for the breach of conditions attached to the suspended sentence what issues may arise? By what standard might the court measure whether a breach has actually occurred and if the court has so determined such a breach, are there degrees of transgression or non-compliance which the court will disregard?

As to the sufficiency of proofs required to allow for a valid re-activation of a suspended sentence McCracken J. in Dignam –v- Groarke, The DPP and the Attorney General (17th November 2000, IEHC 150) stated:

> "As some considerable argument was addressed to me in relation to the nature of the proofs which would be necessary were the applicant to be deprived of his liberty in the circumstances, I think I should comment briefly thereon. The first named respondent was certainly not bound to conduct a hearing in the nature of a criminal trial to ascertain the guilt of the applicant in relation to the matters alleged against him (a murder trial). That would be for another day and probably before a

136 A subsequent conviction would provide proof beyond a reasonable doubt. But evidence of a breach of the peace without conviction is sufficient.

jury in the present case. He did not have to satisfy himself beyond all reasonable doubt. What he had to do was conduct an enquiry to an extent that would reasonably satisfy on the matters at issue, and to conduct the enquiry in accordance with the principles of natural justice, in particular as set out in the State (Murphy) –v- Kielt. In my view, he did not even have to conduct an enquiry in accordance with the strict rules of evidence and he was entitled to listen to and take account of the suspicions of D/Sgt. Kelly. Equally he would have been entitled to look at a report from a Probation Officer. However, he is obliged to satisfy himself that there is a basis for D/Sgt. Kelly's suspicions, and, if such was the case, for the views of a Probation Officer. In particular, he is also obliged to notify the applicant or his legal advisers as to the nature of those suspicions or of that report, give them an opportunity or sufficient time to make their own enquiries and allow them an opportunity to call such evidence as they might think for, following such enquiries." (Dignam –v- Groarke 17th November, 2000 IEHC 150 p.4).

Thus, the judgement of McCracken J. demonstrates that the re-activation of a suspended sentence is based upon an enquiry by the court on evidence and not necessarily to a standard required in a criminal trial, but sufficient to allow the conclusion that the Defendant failed to keep the peace and to be of good behaviour.[137] While a subsequent conviction during the period of suspension might put the matter beyond doubt, and this argument was advanced as the required standard of proof by counsel for the applicant in *Dignam –v- Groarke,* the standard set ultimately by the court was of a much lower degree without necessarily introducing even a further criminal charge against the person conditionally bound over. Paradoxically, in the case of *Dignam –v- Groarke* and the *State Murphy –v- Kielt* both successful applicants for judicial review were alleged to have been involved in serious offences and yet the standard for breach set out by the courts merely called for cogent evidence of a breach of the peace in both cases. In the Supreme Court, Griffin J. in the State (Murphy –v- Kielt 1984, IR 458) stated:

"It is only when a decision has been reached that he has broken one or more of the conditions that such person's right to be at liberty may be terminated. In my

137 This standard is at variance with the standard of proof set out in the People (D.P.P.) –V- Aylmer [1995] 21LRM p.638 where Hederman J. stated the Prosecution was obliged to establish breach beyond reasonable doubt.

opinion, this does not require anything in the nature of a judicial determination. … [a]n informal procedure is all that is required, provided such procedure is conducted fairly" (p.472).

Although it may be informal, the Chief Justice cautioned against applying the modality of common sense thinking to the process when he stated:

> "The facts of this case show that the respondent Governor treated the arrest of the prosecutor (prisoner) on the serious charges as terminating the temporary release. In doing so, the respondent was probably acting in a common sense manner. However, I doubt whether he could lawfully do so without it being clearly established that a breach of the peace had occurred". (O'Higgins C. J. p.470).

(iii) Judicial discretion in revocation proceedings.

Thus far, it is noted that an application on notice to the convicted person is required before a court should consider the revocation of a suspended sentence. Moreover, the convicted person is entitled to be given details of the alleged breach of the condition of the suspended sentence and should be allowed answer the allegation through the assistance of a lawyer. Although the standard of proof required in determining whether the convicted person has failed to keep the peace may not be as high as the proof of guilt beyond a reasonable doubt and certainly does not require the production of a record for a subsequent conviction, a clear finding of fact is required by the court to establish that the breach of a condition has occurred. Thereafter, certain discretionary features emerge in the disposal of the application for the activation of the sentence. The first issue which presents in the activation of a suspended sentence is the matter of judicial discretion to disregard the breach entirely by regarding it as sufficiently trivial that would not warrant the activation of the original sentence. The second issue to be addressed is whether the court has discretion to activate the original sentence but for a lesser period of time than that specified in the original order.

Firstly, courts have jurisdiction to ignore trivial breaches according to Hederman J. in People (D.P.P.) –v- Aylmer [1995] 2 ILRM 638.[138] Hederman J. stated in that case:-

138 The case of D.P.P. –v- Aylmer [1995] 2 ILRM 624 is authority for the proposition that a trivial breach may be disregarded. The accused had been sentenced to ten years imprisonment but Butler J. directed that he be brought back for a review of sentence after he had served thirty six months in custody. Butler J. had died in the meantime and the case came before the President Finlay who suspended the balance of the term of imprisonment, on condition that the accused acknowledged himself in the sum of £100.00 to keep the peace and be of good behaviour for five years and to come up if called upon to do so at

> "… the only matters which this Court can consider are whether it has been established beyond reasonable doubt by the respondent that the appellant was in breach of his recognisance, entered into before the Court on 23rd of March, 1982, and if so satisfied whether the breach was a serious or trivial breach. I am satisfied that if it could have been shown that the breach was a trivial breach, the Court would have had a discretion not to impose the balance of the sentence as indicated, but the offences for which the appellant had been convicted in the District Court in Limerick could not by any stretch of the imagination be termed anything other than serious offences." (People (D.P.P.) –v- Aylmer [1995] 2 ILRM 638).

In the survey, the responses from judges on the level of discretion exercised when considering activation of a suspended sentence were quite interesting. As a preliminary observation, it is worth noting that some judges continue to be sceptical about the possibility of ever having a breach case brought before them when they variously stated:

> "I'd reach for my heart medicine because I would be so excited that it has happened after 18 years on the bench. I'd be close to fainting."A4J2DC

> "…I would say that in my 8 years in XYZ if I had an application by the State to invoke a suspended sentence that I gave, I can't remember it and I am pretty sure that none of them can." A6J1DC

> "Before the new Act…it was very difficult because we had no control over activating it. You are waiting for someone else to activate it." AJ1J6DC

Some of the Judges stated they would hear the parties firstly and depending upon the circumstances otherwise would deal with breaches in a forthright manner:

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any time within the five years, to serve the balance of the sentence. The accused was further convicted of two charges of breaking and entering and causing criminal damage in Limerick District Court within the five year period and was breached. The sentence was imposed.

"The sentence would be fully imposed in the event of the slightest non-compliance. I would impose a full sentence…I don't give credit for time served…my general inclination would be to impose the full sentence…"A9J1HC

"If a fellow is in breach he just does it, he does the time. That [new procedures under Section 99] seems to have stopped a lot of it…it has brought a sense of purpose and seriousness in the criminal's mind. I better behave here because there are no reviews…I have structured the
sentence here which was for the defendant's benefit…if he doesn't take it up that comes at a price and the price is that I reactivate the sentence." A7J3CC

"Once it is brought back bang! I impose the sentence in full. The likelihood is he will serve the full sentence." A4J1DC

"My gut reaction would be in the circumstances to impose the sentence (in full)… unless there was some very very good, very very strong genuine reason as to why it shouldn't be invoked."A6J1DC

Meanwhile other judges saw a greater role for the exercise of discretion by allowing a "further chance" to the offender when they stated:

"Normally, I would impose the sentence in full or if there is a genuine excuse for it I will put the matter back and generally require him to appear again before me to see how he is complying with whatever order has been made. If he comes back on the first occasion complying, then I will happily leave the matter as it is. It hasn't happened very often."A2J1DC

"I don't ignore the breach. It depends upon the seriousness of the breach. I have had people brought back before me who would have received a sentence of say 6 years. I am using 6 as the standard. We are talking in the realm of 4 to 6 years or 4 to 7 where I have suspended somebody and they have been brought back by the Guards for what I considered to be not very serious breaches. The original sentence would have been imposed for a serious assault or for a robbery, matters like that whereas a breach very often has been something…I have even had one for dangerous

driving or public order and I would consider those breaches as not being very serious on the basis that if he has done 4 years, he comes out in the end, he will fall by the wayside once or twice and you have to be understanding about that. And there may be circumstances. Do I go back to the original sentence? I know I have done it but how often? And the answer to that is rarely." A3J1CC

Meanwhile, his colleague took a contrarian view:

"Generally, I take the view that there is no second chance. I often say to people "look can't be messing around with you giving you second chances because eventually it is going to deny some other unfortunate his first chance." A5J1CC

The former judge's requirement that the substance of the breach should be of an order of magnitude almost equivalent to the original offence places the activation of the suspended sentence at a very high threshold. In the *Aylmer* case a conviction in the District Court for criminal damage and breaking and entering and for which two concurrent sentences of 12 months imprisonment were imposed was considered sufficient to tip the balance in favour of activation of the sentence in the Central Criminal Court of 10 years imprisonment 7 of had been suspended upon review for the offence of robbery Contrary to Section 23 of the Larceny Act 1916.

The passage of time was considered an important factor for consideration by one judge when he reflected upon the suspended sentence which requires compliance with conditions which would endure for quite a number of years:

"I would be reluctant to reactivate a very long sentence after a longish period." A8J1SC

Thus it may be observed that discretion has a significant role to play when the court considers whether to activate the sentence or not.

At common law, there appears to be no discretion in an Irish sentencing court but to impose the full penalty prescribed in the original order, once the court is satisfied that the circumstances giving rise to the breach such as the commission of a further offence do not

fall within the category of trivial matters or trivial offences.[139] Under the judicially developed suspended sentence, if the breach is not considered trivial then the court appears to have no discretion but to impose the full original sentence upon finding that the convicted person is in breach of a condition attached to the suspended sentence. The authority for this can be found in People (D.P.P.) –v- Ian Stewart (Court of Criminal Appeal, 12th January, 2004) where Hardiman J. presiding in the Court of Criminal Appeal declared that the sentencing judge having imposed the full suspended sentence "was constrained to act as she did".[140] The Judge observed that there was no Irish statutory equivalent to the English statutory provision which allowed the Court to impose a sentence in whole, that is for the full original period, or for a substituted lesser period. The new statutory suspended sentence in Ireland under Section 99 of the Criminal Justice Act 2006 allows a Court when considering revocation to impose a lesser custodial period than that specified in the original suspended sentence, if the court considers this just having regard to all the circumstances of the case. However, the judicially developed suspended sentence did not allow for this discretion. Hardiman J., concluding for the Court of Criminal Appeal, stated:

> "We can see no error in principle in what Judge Dunne did, and indeed we cannot see that she could have taken any other step." (Hardiman J. People (D.P.P.) –v- Ian Stewart, 12th of January, 2004 Court of Criminal Appeal).

When writing earlier on this issue O'Malley (2000), using English case law, suggested that "the fact that the breach occurred towards the end of the period for which the sentence has been imposed does not preclude a court from ordering that the full term be served (R.v. Fitton 1989, 11Cr .App. R.(F) 350) although it has discretion to order the service of a shorter period (R.v. Carr 1979, 1.Cr. App.R. (F) 53." (p.291). Counsel for Ian Stewart

139 Had the Criminal Justice Bill 1967 been enacted, it would have allowed more latitude to the courts dealing with applications for activation of the original sentence. Section 50(1)(b) provided: "In the event of a breach of any such condition, the Court, if it thinks proper to do so, may [1] permit the breach to be disregarded and the suspension to continue or [2] in lieu of the sentence or fine substitute in the case of a sentence such reduced sentence or such fine and in the case of a fine such reduced fine as the Court may consider appropriate having regard to all the circumstances of the case" (Criminal Justice Bill, 1967). Under the statutory suspended sentence, Section 99 Criminal Justice Act, 2006 a similar provision is provided. (see discussion in Chapter 7).

140 The accused was given a sentence of 10 years (cumulative) imprisonment for the use of a knife and a threat to kill which was suspended. A number of breaches (3) were brought to the attention of the trial judge who continued to extend leniency on the basis that the offender's drug dependency would or could be addressed. In the meantime the trial judge retired. The accused absented himself from the drug treatment centre and later presented there apparently having taken drugs. On application for breach, Judge Dunne revoked the suspension and activated the sentence in full. The revoking court and the appeal court both paid particular regard to the wording of the original sentence which recited that the applicant must "come up if called upon to do so, to serve the sentence of the court this day imposed but suspended upon your entering this bond (emphasis added)" (People (D.P.P.) -v- Ian Stewart, ex tempore, Court of Criminal Appeal, 12 January 2004 p.3.

put forward this argument in his appeal but this was rejected by the court specifically on the grounds that these English cases were predicated on a statutory power to apply a lesser sentence upon activation. As observed in the case of D.P.P. –v- Ian Stewart (Court of Criminal Appeal, 12th January, 2004) such discretion does not arise in Irish sentencing practice at common law once the court determines that the breach is a non-trivial breach.

The issue of discretion to impose a lesser sentence emerged more recently, but not centrally in a case where the applicant sought judicial review of a suspended sentence. (Gareth McCarthy –v- Judge Patrick Brady and D.P.P. I.E.H.C., 30 July 2007, unreported).[141] He contended that the period of suspension was in excess of the custodial sentence by a factor of 12. The applicant argued that in accordance with the judgement of Keane C.J. in People (D.P.P.) –v- William Hogan (unreported, Court of Criminal Appeal, 4th March 2002) that the period of suspension should have been for a period identical to the custodial period in the absence of stated and special reasons given. De Valera J. quoted O'Malley wherein he stated that "where a suspended sentence is to be reactivated it must be reactivated in its entirety" (2006:457). The time sequence of this case is important. The case commenced in 2005 by way of leave for judicial review before the statutory suspended sentence was in force. The case for judicial review was argued before the High Court in January 2007 and the judgment was given on the 30th July 2007 when on both dates the statutory form of suspended sentence was in force. It is unclear from the short judgment given whether the discretionary feature introduced under Section 99(10) to allow for the substitution of a shorter sentence was considered. The judgment makes no reference to the arrival of this new statutory discretion to permit the court to impose a lesser sentence than that mandated previously at common law under the decision in People (DPP) –v- Ian Stewart (unreported, 12th Sept. 2004 Court of Criminal Appeal). It may well be that the High Court while aware of the discretion allowed under the new section, eschewed all further consideration of the section as the sentence under judicial review had

141 The accused was given a sentence of 9 months imprisonment for unlawful taking of a motor car (Section 112 Road Traffic Act 1961), the latter 3 months of which were suspended for a period of 36 months with conditions attached. This amounted to a part suspended sentence. The applicant did not appeal to the Circuit Court. Instead he sought judicial review of the sentence on the basis that the suspensory period was disproportionate and exceeded the jurisdiction of the District Court by a factor of 3 (12 months for 1 or 24 months imprisonment for 2 indictable offences). The judicial review was disallowed on the basis that an appeal was the appropriate remedy.

not initially been made under the statute but rather preceded its introduction and therefore had to follow the ratio in the *Stewart* case.[142]

At the time of writing it is not known to any degree of certainty how the courts will proceed to use the suspended sentence by utilising the jurisprudence and structures from both common law and the statute. Perhaps the case of *McCarthy* above provides the greatest opportunity for confusion on the issue because it belongs to that category of transitional cases where the principles applied may not be settled. A more settled jurisprudence would be expected to emerge when the suspended sentence is seen to be utilised solely within either the statutory regime or else exclusively within the common law regime and without reference to the statute. The discrete form of suspended sentence provided for under Section 99 of the Criminal Justice Act 2006 will be more fully discussed in the next chapter. However it is perhaps opportune at this stage to briefly introduce the statutory form of suspended sentence to discern whether the judges will continue to use the modalities and jurisprudence developed at "common law". As noted earlier in this chapter, some of the judges believed that it was still permissible to make a suspended sentence without placing any conditions upon the offender. Generally these rare cases would involve an offender without previous convictions and who was deemed most unlikely to re-offend. When questioned specifically on the continued use of the modalities developed by the judiciary to structure a suspended sentence, and the statutory regime recently introduced under Section 99 of the Criminal Justice Act 2006, some of the judges explicitly stated they would continue to sentence in the traditional manner.[143] One judge put it thus when he stated he had a discretion to use or not to use a bond in the suspended sentence:

> "More often than not they enter into a bond. I would certainly say that over 80% are bonds…I operate under the old system." A3J1CC

Quite a few of those interviewed however, particularly at the District Court level, stated they would abandon the previously used modalities and would now embrace the statutory

142 In McCarthy the reference to a liability to serve the full term of imprisonment upon activation was called in support of the argument that the suspensory period should not exceed the custodial period except for specified reasons. The case otherwise was not concerned with the issue of discretion in the case of activation.

143 Section 99(1) provides that the offender shall enter into a recognizance. Section 99(2) makes specific provision for minimal conditions of good behaviour. In the common law form of sentence a bond is not always used. Thus, the use of the bond under Section 99(1) would standardise the procedure if the statutory suspended sentence was used universally.

regime instead. Interestingly, in the replies given, the same judges used the language and expressions of the judicially developed suspended sentence, but usually concluded their remarks on the topic by giving a clear indication that henceforth the new regime would only be used. An analysis of their replies suggests that their conversion to the new regime is due directly as a result of a new confidence in the enforcement of breach proceedings and not as a result of any perceived obligation on their part to abandon the old system by the introduction of the statutory suspended sentence. Examples of the District Court judges` views are as follows:

> "I can say that suspended sentences meant nothing to me until the 2006 Act because I had perceived over the years that they were a waste of time and nobody was ever brought anybody back to me on a sentence. I just stopped using them because I did not believe in them." A4J2DC

> "Generally speaking when I impose a suspended sentence, I do it in the manner of saying the warrant not to issue unless the accused is convicted of a further offence committed on or after whatever date of actually imposing and suspending the sentence and within whatever period generally 12 months…with the new regime I will be using that (the bond) exclusively." A2J1DC

Although one Supreme Court judge did refer to the paucity of breach of proceedings taken under the old system of suspended sentences, generally the judges interviewed in the Circuit and Central Criminal Courts were reasonably confident that breaches of any seriousness, if they occur, would be brought to the attention of those respective courts. In contrast the judges in the District Court had little or no confidence that the old system was efficacious. They based this lack of confidence explicitly on the failure of the relevant authority usually the Gardai or the DPP, to re-enter the case for consideration of breach when such breach was manifest in a subsequent conviction.

As noted, the enforcement of suspended sentences is procedurally complex and these complexities have been a feature of the sanction from the beginning according to Osborough (1982:255). However a degree of clarity has been given by the Superior Courts in relation to such issues as:- the power of the court to disregard trivial breaches; the necessity to invoke the original sentence in full if the sentence is to be activated at all; the

minimum procedures required to bring the offender back before the court while protecting the offender's right to be heard in full and on notice of any allegation of breach, and the standard of proof which the court may apply in deciding if a breach has occurred. These latter decisions interweave substantive law and procedural issues which have developed solely on a judge made basis in the recent past. Except for the discrete issue of conditional time limits in the District Court Rules, 1997 on the issuance of warrants, all other procedural issues have been established from case law and the constitution.

(iv) Activation of the part suspended sentence.

The part suspended sentence presents as a combination of both a custodial sentence and a fixed period thereafter which is also a custodial sentence but which sentence is conditionally suspended. As noted previously, the part suspended sentence is used extensively by courts exercising indictable jurisdiction particularly since the *Finn* case where the reviewable sentence was deemed to be incongruent with the principle of the Separation of Powers under the Constitution. Latterly, the Circuit and Central Criminal Courts have abandoned the Butler type order in favour of the part suspended sentence. Such courts therefore no longer retain seisin of the sentencing function once the part suspended sentence has been pronounced. The execution of the sentence passes entirely into the hands of the Executive under the part suspended sentence. A part suspended sentence may be activated in the same manner as the fully suspended sentence and likewise the criteria for breach and activation and the standard of proof are similar. Moreover, judicial discretion to activate or not activate apply in equal measure as for the fully suspended sentence. But the part suspended sentence must be the subject of scrutiny for one particular reason namely the remission of sentences. This topic requires a specific consideration especially when one comes to the issue of the activation of the sentence. As the part suspended sentence is a two phase sentence, the custodial followed by the suspended custodial, the prisoner is entitled to remission of sentence for good behaviour for the initial custodial period. Moreover, a sentence may only be remitted by a competent legal authority. These two related matters must now be examined. Up to quite recently the entitlement to remission of sentence was expressly provided for under The Prisons (Ireland) Act 1907 and the Rules for the Government of Prisons 1947.

Section 1(i) of the Prisons (Ireland) Act 1907 provides:

> "Provision may be made by prison rules for enabling the prisoner sentenced to imprisonment, whether by one sentence or cumulative sentences, for a period prescribed by the rules, to earn by special industry and good conduct a remission of a portion of his imprisonment and on his discharge his sentence shall be deemed to have expired". Section 1 Prisons (Ireland) Act, 1907.

And

Rule 38(1) of the Rules for the Government of Prisons, 1947 provides:

> "A convicted prisoner sentenced to imprisonment, whether by one sentence or cumulative sentences for a period exceeding one calendar month shall be eligible, by industry and good conduct, to earn a remission of a portion of his imprisonment not exceeding one fourth of the whole sentence, provided that the remission so granted does not result in the prisoner being discharged before he has served one month."

But a certain difficulty presented in the case of Michael O'Brien –v- Governor of Limerick Prison [1997] 2ILRM where the prisoner on a part-suspended sentence claimed to be entitled to remission of sentence of 1 year, having served 3 years of the initial custodial sentence of 4 years which was then to be suspended for the remaining six years. The appellant to the Supreme Court had been sentenced to ten years imprisonment but the sentencing court had ordered that the latter six years of the sentence were conditionally suspended. It should be noted that the entire sentence was given at the one sitting of the court. In the High Court, in an application for an Order under Article 40 of the Constitution of Ireland 1937, the applicant challenged the lawfulness of his detention by the respondent on the grounds that he was entitled to be released pursuant to Section 1 of the Prison (Ireland) Act, 1907 and the Rules for the Government of Prisons, 1947 Rule 38 (1). The applicant had served in excess of three years out of four years imprisonment as originally ordered by the sentencing court. The applicant claimed *ceteris paribus*, that he was entitled to one quarter remission for good behaviour. The High Court upheld his detention on the basis that the original intention of the sentencing Judge was that he should serve a minimum of four years in custody. On appeal, the Supreme Court, holding in favour of the appellant, agreed that it was the intention of the sentencing judge that the prisoner should serve a minimum of four years in custody, but notwithstanding

this, it was necessary that the same sentence should not usurp the statutory provisions relating to the granting of remission of sentence. In this regard, the statutory provisions must prevail. O'Flaherty J., with whom the other members of the court concurred, having examined the statutory provision and regulations stated:

> "… this clearly contemplates that the period of imprisonment should be identical with the period of the sentence. Likewise, the Rules for the Government of Prisons, 1947 contemplate that the period of the sentence should be identical with the period of imprisonment. … [t]he real question is whether a sentence in this form, can properly be reconciled with the provisions of the Prisons (Ireland) Act, 1907 and the Rules for the Government of Prisons, 1947. In the opinion of this Court such a sentence cannot be reconciled with the Act and with the Rules and should not therefore be imposed." O'Flaherty J., O'Brien –v- Governor of Limerick Prison [1997] 2 ILRM 356

Mr. O'Brien, the prisoner, was accordingly released. It was held that the discharge of the prisoner with a period of imprisonment suspended over him was not congruent with the legislation and the sentence was at an end. The *O'Brien* case raised two issues which emerged from an interpretation of Section 1(1) of The Prisons (Ireland) Act 1907. Firstly, was the prisoner entitled to remission of one quarter as provided in the prison rules and under the statute and secondly what did the phrase "on discharge of a prisoner his sentence shall be deemed to have expired" mean? The Supreme Court had no difficulty in recognising the prisoner's entitlement to remission of one quarter of the sentence for good behaviour. Moreover the court also clearly indicated that a sentence which was not discharged upon the release of the prisoner was inconsistent with the statutory provision and should not have been made as it would endure as a suspended sentence. Thus the part suspended sentence under *O'Brien* was cast in doubt. The court even went so far as to recommend a reviewable sentence instead of the part suspended sentence to avoid clashing with the statutory provisions of Section 1 (1).[144]

Whether by coincidence or otherwise, the difficulty presented for the part suspended sentence under Section 1 of The Prisons (Ireland) Act 1907 was short-lived. A mere 19 days later the entire section was repealed by Section 23 of the Criminal Justice

144 However, this was before the same court gave its views, albeit obiter, in Finn which deprecated the further use of the reviewable sentence.

(Miscellaneous Provisions) Act 1997 on the 4th March of that year. Thus the provision of a presumption of a complete discharge of the sentence on the release of the prisoner was abolished. But the repeal of the section also removed the statutory basis for the provision of remission of sentences for good behaviour. From the 4th March 1997 onwards, the location of an entitlement to remission was to be found only in a statutory instrument namely the Rules for the Government of Prisons 1947 which was stated to continue in force and have the same effect as it made under Section 19(8) of the Criminal Justice (Miscellaneous Provisions) Act 1997. Under Section 19(1) the Minister for Justice was empowered to make prison rules and under Section 19(3)(f) the power to make rules for the remission of sentence was specifically mentioned. The 1947 rules continued in force until these were also repealed by Section 120(1) of the Prison Rules 2007 on the 1st October 2007 (S.I. 252 of 2007). Section 19 of the Criminal Justice (Miscellaneous Provisions) Act 1997 was repealed by Section 42 and replaced by Section 35 of the Prisons Act 2007 which makes general provision for the Minister for Justice to make rules for the regulation and good government of prisons and specifically makes reference to the power to make rules for the remission of a portion of a prisoner's sentence (Section 35(2)(f)).

Rule 59 of the Prison Rules 2007 provides;

> Rule 59.(1) a prisoner who has been sentenced to
>
> (a) a term of imprisonment exceeding 1 month, or
>
> (b) terms of imprisonment to be served consecutively the aggregate of which exceeds 1 month,
>
> shall be eligible by good conduct, to earn a remission of sentence not exceeding one quarter of such term or aggregate.
>
> (2) The Minister may grant such greater remission of sentence greater than one quarter but not exceeding one third thereof where a prisoner has shown further good conduct by engaging in authorised structured activity and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community.

The prisoner is entitled to be informed upon reception into prison of his/her earliest date of release (Rule 15 Prison Rules 2007) which date must include an indication of time to be allowed for remission for good behaviour.

The prisoners' entitlement to remission of sentence at the time of writing is firmly established under the Prisons Act 2007 and the Prison Rules 2007. No distinction may be drawn in respect of a prisoner who is serving an initial custodial sentence which forms part of a part suspended sentence. The part suspended sentence at common law, must yield to any statutory or regulatory provision on the calculation of remission. Traditionally, when a court makes a part suspended sentence, it provides that a certain period of custody shall be served e.g. 7 years imprisonment the latter 3 years of which shall be suspended provided the accused enter into a bond to keep the peace. Again, the issue of time is significant in this arrangement. If sufficient care is not taken to structure the sentence as a continuous whole, the period of remission may not be captured by either the bond or the period of suspension. In the example given the prisoner is entitled to be released at the conclusion of year 3 in custody provided s/he is of good behaviour. But if the latter 3 years of the sentence are suspended what is the status of the suspended sentence for the 4th year? Is there a hiatus of sentence between the end of the 3rd year and the commencement of the 5th year? More importantly, is it possible to attach liability to the accused if the suspended sentence is structured to apply only to the latter 3 years of the sentence? As will be revealed in chapter 7 Section 99(2)(b) of the Criminal Justice Act 2006 specifically anticipates this issue by providing that a bond must be entered into at the original sentencing court to bind the accused on foot of recognisance for a period which includes both the period of imprisonment and the period of suspension of the sentence concerned. If the sentencing courts which utilise the part suspended sentence fail to adopt this section and continue to apply judicially developed procedures as previously, the possibility remains that the activation of the part suspended sentence may be impeded in certain circumstances.

Another time issue emerges when the concluding year of the part suspended sentence is examined. In the example given above the accused is released after 3 years of a 4 year custodial sentence which is then followed by a 3 year part suspended sentence. However the accused is still bound over by the 7 year bond. If she/he breaches that bond in the 7th year what possible risk does the accuse face for activation of the 3 year part suspended sentence? In a technical sense she/he is still under the jurisdiction of the court and breach proceedings could be brought against him/her. Notwithstanding the endurance of the bond for the 7 year period, it is doubtful if the sentence could be activated when the

accused has served his/her custodial sentence in full with remission and the suspended part of the sentence i.e. the remaining 3 years has expired. While the prisoner's entitlement to remission is now settled, potential difficulties may persist in the activation of the part suspended sentence as a result of the operation of remission.

The entitlement to remission of sentence must not be confused however with the power to grant remission by lawful authority. As previously noted, the power to pardon, commute or remit sentences is usually given to the Head of State (Sebba 1978:68).

Article 13(6) of the Constitution of Ireland 1937 provides:

> The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may, except in capital cases, also be conferred by law on other authorities. (Article 13.6)

Such powers were conferred by law pursuant to Section 23 of the Criminal Justice Act 1951 which provided:

> Section 23
> (1). Except in capital cases, the Government may commute or remit in whole or in part any punishment imposed by a Court exercising criminal jurisdiction, subject to such conditions as they may think proper.
>
> (3) The Government may delegate to the Minister for Justice any power conferred by this section and may revoke any such delegation.

There is some doubt that the Minister for Justice could be delegated the authority from the Government to remit sentences pursuant to Section 23(3). In the case of Patrick J. Brennan -v- Minister for Justice, Ireland and the Attorney General and Others [1995] I.R. 612-631 the plaintiff, a sitting judge of the District Court, sought various declarations to impugn the powers of the Minister for Justice to remit fines by way of petition to the Executive. The court was satisfied that the Government did in fact delegate the Minister for Justice the power conferred under Section 23. No specific document is referred to in

the judgment to substantiate such delegation. Geoghegan J. dealt with the issue as follows in his judgment;

> "Pursuant to its powers under subsection 3 of Section 23, the Government did in fact delegate to the Minister for Justice the power conferred by the section. I have some doubts as to whether Article 13 of the Constitution permits such delegation and therefore as to whether a query might arise as to the constitutionality of subsection 3 of Section 23 of the Criminal Justice Act 1951. But although the constitutionality of that section has been challenged in these proceedings, no challenge has been put forward on that particular ground and therefore I am making no decision on it. For the purposes of this judgment I am assuming that a lawful delegation of the power was made by the Government was made to the Minister for Justice". (Patrick J. Brennan -v- Minister for Justice, Ireland and the Attorney General and Others [1995] I.R. 618)

Accordingly, the *Brennan* case proceeded without a determination of the validity of the power of the Minister for Justice to remit sentences on this point. It was assumed for the purpose of the case that such delegation was lawful. The issue was soon clarified by the repeal of Section 23 subsection3 of the Criminal Justice Act 1951 and its replacement by the following section in Section 17 of the Criminal Justice (Miscellaneous Provisions) Act 1997:

> Section 23a
> "(1) The Government may **by order** delegate to the Minister for Justice any power of the Government under Section 23 of this Act.
> (2) The Government may **by order** revoke an order under this section."(emphasis added by writer)

This new section came in to operation on the 4th March 1997. This amendment gives clear recognition to the deficiencies in the lawmaking process to grant to the Minister for Justice the power to remit sentences. There can be no doubt that the President has the power to remit sentences on the recommendation of the Government. Similarly, since 1951 the Government itself as a corporate whole was invested with such power to remit a sentence of imprisonment (Section 23(1)). However a significant doubt existed about the power of

the Minister for Justice to exercise such powers of remission in the absence of any formal endowment. Surprisingly, no formal order appointing the Minister for Justice was made until the 20th October 1998 under S.I. 416 of 1998. Arguably, the Minister for Justice did not have the power to remit a fine or a sentence from the time of the passing of the Constitution until the 20th October 1998.

Prior to the coming into force of the Constitution of Ireland in 1937, clear provision had been made to allow the Minister for Justice the power to remit sentences pursuant to S.I. No. 224 of 1937 - Executive Powers (Remission of Sentences) Order 1937 and made pursuant to the Executive Powers (Consequential Provisions) Act 1937 which order came into force on the 11th December 1936. These provisions pre-date the Constitution of Ireland 1937 which came into force on the 27th day of December 1937. Is it possible that these provisions continued in force by virtue of Article 50 of the Constitution 1937 and remained in force up to the 20th October 1998 when the Minister for Justice was formally granted the power to remit sentences by statutory instrument?

On the effect of Article 50 Byrne and McCutcheon (1996:558) state:

> "Like Article 73 of the 1922 Constitution, Article 50 of the 1937 Constitution provided that the laws in the Irish Free State continued to have full force and effect unless they were inconsistent with the 1937 Constitution or were repealed by the Oireachtas established by the 1937 Constitution…"

Thus if the delegation was not inconsistent with the Constitution itself it may have survived with the Minister's powers intact. However, the power of remission should not be regarded as something "already out there now" in 1937. Instead a new and specific power was created under Article 13.6 and was given specifically to the President as Head of State. As the power derives from the Constitution itself it may be erroneous to hold that the delegation of that power whether to the Government or to the Minister for Justice could exist prior to the 27th December 1937. Moreover the passing of Section 23 of the Criminal Justice Act 1951 and the amendment thereof by Section 17 of the Criminal Justice (Miscellaneous Provisions) Act 1997 and the Statutory Instrument 416 of 1998 can hardly be seen as restatements of the pre-constitutional powers enjoyed by the Minister for Justice before the 27th December 1937. Significantly, these latter sections and statutory instrument

make no mention of the preconstitutional arrangements for the remission of sentences. Therefore, the post-constitutional legislation on the remission of sentences must be seen as the only legitimate source for the delegation of the reserved power of the President to grant pardons and to commute or remit sentences. Thus, it is likely that the purported exercise of the power of remission of sentences and fines by the Minister for Justice was irregular for the period from the 27th December 1937 to the 20th October 1998.[145]

As previously noted the activation of the part suspended sentence may be influenced by the remission or non remission of the initial custodial sentence before it is then suspended. While there is no longer any difficulty about the entitlement of the remission it is only relatively recently that the issue relating to the power to grant remission has been finally settled.

In summary the activation of the suspended sentence is subject to certain discretionary practices. When the infraction complained of is regarded as a trivial offence, the activation of the suspended sentence may not occur. Where the breach of the suspended sentence is not regarded as trivial, the full suspended sentence is mandatory under the Judge made suspended sentence. In order to allow for the activation of a suspended sentence, the court must determine that there has been a breach of a condition which determination is based upon evidence. The standard of proof in making such a determination need not be as high as that required in a criminal trial but the mere making of an allegation of breach is not sufficient to warrant activation. Finally, the interface between the part suspended sentence and the issue of remission of sentence may present difficulties when a breach is brought before a court for consideration of activation of a sentence.

(v) Activation of the suspended sentence and the role of the recognisance.

A suspended sentence is usually constructed upon the convicted person entering into a recognisance to keep the peace and to be of good behaviour for a specified period of time known as the operative period. Moreover, s/he further undertakes to come up for sentence if called upon to do so. Prior to October 2006 the use of a recognisance was not universally deployed in constructing a suspended sentence, particularly in the District Court. The recognisance, this writer contends, is not an essential feature of the

145 Clearly under Section 23 subsection 1 the Government as a corporate body had the power to remit sentences, but the remission of a sentence by Cabinet decision must indeed be a rarity.

suspended sentence although it has been used consistently as a mechanism to reflect the elements of conditionality and consent. However, when the issue of activation of the suspended sentence arises, the status of the recognisance is peripheral to the main issue – namely the event of the breach of a condition. If the recognisance is used at all, clearly the continued existence of a recognisance is necessary to allow the Court to determine whether the breach occurred during the period prescribed for the duration of the bond and the period of suspension. On this point, it has been noted that if a recognisance is used in structuring a suspended sentence, the period of the bond should be coterminus with the period of suspension of the sentence. However, some commentators insist that activation of the suspended sentence is inextricably bound up with the issue of enforceability of recognisances. Rottman and Tormey in their advice to the Whitaker Committee in 1985 claimed that "a suspended sentence in the District Court, however has the defect that recognisances and sureties are not enforceable" (1985:215). Beyond making this claim they do not go into detail. At the time of the advice given to the Whitaker Committee, the operative District Court Rules applicable were the 1948 Rules. Rule 82 of the District Court Rules, 1948 sets out the procedure for estreatment of recognisances including recognisances to keep the peace and to be of good behaviour. Rule 82(f) stated:

> "The said Order may be enforced against the principal party in the same manner as any other Order imposing a penalty in the case of an offence may be enforced and may be enforced against a surety by Warrant of Distress".

Similar enabling provisions are provided in the District Court Rules, 1997.

Perhaps a teleological analysis is best used to untangle the two issues under discussion here. The intended result of any application by the Prosecution to activate a suspended sentence is the imposition of the custodial sentence. Where a recognisance is used to construct the suspended sentence, evidence of a breach of a condition contained within the recognisance must be given, before the Court will order the revocation of the suspension and impose the custodial sentence. However, the intended result in any application by the Prosecution to estreat sureties attached to any recognisance is the extraction of a payment of money for breach of the bond itself. In a sense this latter procedure might be regarded as an

additional or secondary fine which may result from a failure by the convicted person to observe a condition of the recognisance.[146]

But the important point of difference, this writer contends, in the two procedures - namely an application to activate a suspended sentence and an application to estreat sureties in a recognisance, is that the former activation is not dependent upon the latter estreatment as claimed by some writers (Osborough 1982:255, Rottman and Tormey 1985:215). When an application is made by the Prosecution to the criminal courts in Ireland to revoke a suspended sentence and to have the custodial sentence imposed, such application usually proceeds without any concomitant application to have sureties estreated. Quite simply, applications to estreat recognisances are extremely rare indeed where the courts are otherwise focussed upon the primary issue whether to revoke a suspended sentence or not. The practice of de-coupling the application to revoke the suspension of the custodial sentence from any application to estreat recognisances does not appear to have adversely affected the ability of the courts to activate custodial sentences upon finding a breach of a condition.

In conclusion, the rules developed by the courts in Ireland for the activation of a suspended sentence are derived from judicial practice and are organic in nature. The procedures for the estreatment of sureties attached to a recognisance are provided for in Rules of Court. The interface between these two sets of rules has given rise to some confusion particularly when the issue of the enforceability of the suspended sentence is examined. It has been argued here that the enforceability of the suspended sentence is not dependent upon the enforceability of sureties. The role of the recognisance in the construction of the suspended sentence must be seen as a mechanism to conveniently record the conditions of the suspended sentence and a record of the convicted person's consent to comply with those conditions. Thereafter, the power of the court to revoke a suspended sentence is not impeded by the issue of estreatment. In fact, applications for the estreatment of sureties have fallen into desuetude for most recognisances, including even estreatment of bail recognisances. The number of applications for estreatment of bail sureties is miniscule compared to the overall number of bench warrants issued and executed daily for the non-appearance of accused persons in the criminal courts.

146 Under the Criminal Justice (Community Service) Act, 1983 a fine may be imposed for failure to comply with the terms of a Community Service Order in addition to the activation of the alternative custodial sentence. This represents an additional penalty within the sanction.

(vi) Activation of sentence the pivotal role of the prosecution.

An outstanding issue relating to the activation of the suspended sentence which endures since Whitaker reported upon it in 1985 is the inadequacy in identifying breaches of conditions and particularly the lack of systematic re-entry of cases for revocation. As observed, a trivial breach may be disregarded by the court when an application for revocation is made. Moreover, the question of who precisely has the function of determining whether the alleged breach is trivial or not is critical to the operation of the suspended sentence. Is it the function of the Executive in the form of the Prosecution or is it solely a Judicial function? Prior to 2007 the District Court Rules appear to point exclusively to the Prosecution as the sole moving party, when it comes to the re-activation of a sentence. This appears to be so even to the exclusion of any Judicial initiative (District Court Rules 1997, Order 25 Rule 3).[147]

Of fundamental importance in the activation of the suspended sentence is the sole discretionary role of the prosecution in deciding to apply or not to apply to the court, on notice to the convicted person, to have the original sentence, which was suspended, activated. Osborough has written of the "dearth of solid information on contemporary enforcement practice" (Osborough 1982:254). In this writer's experience when dealing with criminal matters, the number of cases entered for re-activation of sentence are surprisingly few and exceptional, notwithstanding that suspended sentences are given with reasonable frequency in the District Court.[148] This view is substantially supported in the interview data in this chapter. Initially, of course, the prosecution, through the Gardai, must become aware of a breach of a condition attached to a suspended sentence before the possibility of activation can arise. The failure or reluctance of the prosecution to re-enter cases for activation of sentence is particularly noticeable even in cases where further convictions are obtained by persons already under a suspended sentence. In the Circuit and Central Criminal Courts the function of re-activation also commences within the prosecutor's discretion, although such cases are re-entered for activation of sentence more frequently. This pattern was confirmed in the interviews and referred to earlier (A7J1CC, A3J1CC, A9J1HC). It is not quite obvious what factors may cause the prosecutor to re-

147 In chapter 7, it will be shown how for the first time the courts themselves are also given powers to initiate revocation proceedings upon finding an offender guilty of a subsequent offence under section 99(9) Criminal Justice Act 2006.

148 Such breach proceedings are exceptionally rare even when the same offender is reconvicted within the operative period of the suspended sentence, even before the same sentencing judge.

enter or to refrain from re-entering cases for activation of a suspended sentence in the District Court, Circuit Criminal Court or the Central Criminal Court, but the emergence of discretionary practices by the Prosecution especially in respect of cases which would, if re-activated, warrant the activation of sentence suggest the application "dispositive values" (Ashworth 1994) when dealing with certain offenders. Ashworth has characterised the rendering of police cautions in England and Wales as an exercise in dispositive values where discretion is exercised by police officers in disposing of cases, usually of a minor nature and for first time offenders by way of a simple caution. The case proceeds no further within the criminal justice system after the issuance of a caution.[149]

As a result of the use of police cautions, the volume of offences prosecuted especially in the Magistrate's Courts in England and Wales has reduced significantly. Moreover, police overtime and waste of resources which were previously expended in dealing with these offences in court were greatly reduced. But the discretion to dispose of these numerous minor offences through the process of Police cautioning is exercised at a pre-prosecution stage of the criminal justice process. The value judgments exercised by the police officer at that stage are at most prosecutorial where a decision is made to either caution the offender or to proceed on a formal charge before the courts. However, when the issue arises to proceed or not to proceed with an application to re-activate a suspended sentence, it should be noted that the prosecution has already been initiated, the guilt of the offender secured and the sentence conditionally concluded. The application of such dispositive values in the post conviction context may be seen as an impediment, even an interference, in what is strictly speaking, an exclusively judicial function to pass sentence (People (D.P.P.) –v- Aylmer [1995] 2 ILRM).

One Circuit Court judge observed "the Guards are very fair" and are willing to turn a "blind eye" to an offender who may be on a suspended sentence who has further offended (A3J1CC), but that serious infractions would certainly be brought to the notice of the court. As observed earlier, the judges in the District Court in contrast believed that even serious infractions went unchallenged.

149 It should be noted that such a scheme has also been introduced in the Republic of Ireland on the 1st of February, 2006 for all public order offences and for theft and for criminal damage offences where the monetary value of the damage or article stolen does not exceed €1,000.00. The Irish adult cautioning scheme is established on a non statutory basis as an administrative scheme and is loosely modelled on the scheme in operation in England and Wales.

In the Circuit Criminal Court and the Central Criminal Court there is no formal procedural rule of court for the re-entry of a case for the lifting of a suspended sentence. The practice has been for the prosecution to apply on notice to the accused or through his solicitor to have the matter brought back to court. On the return date if there is no appearance by the convicted person, a warrant is issued to secure his/her appearance before the matter proceeds further.

In the District Court, the prosecution had the sole right to seek to have the suspended sentence activated (District Court Rules 1997, Order 25, Rule 3) and although a Judge of the District Court may have suggested a case be re-entered, s/he was not empowered of his or her own motion to have such a case re-entered. Thus, by virtue of the District Court Rules, the District Court Judge was denied the opportunity of invoking a judicial function unless the Prosecution exercised a function which in practice had all the hallmarks of a discretionary function, to initiate the activation process. Notwithstanding claims to the contrary by Ryan and Magee (1983) there is no automatic feature to the activation of a suspended sentence. Everything depended upon the prosecution to initially decide to seek activation of the sentence and, secondly, the successful service of the Notice for Re-Entry on the accused or the execution of a warrant to secure the appearance of the convicted person back before the court. The role of the prosecution as sole gate-keeper to the process, while invested with what appears to be wide discretionary powers to re-activate, placed the suspended sentence in a special category of penalty which was partially judicial but conditionally so, subject to the prosecution's effective *veto* on activation.

Such an anomalous result begs the question: who retains ownership of the sentence which is suspended? It seems the court retains ownership but this is conditional upon the prosecution's discretion to seek to have the case re-entered for activation. In Ireland, the prosecution of criminal cases in the District Court is performed almost exclusively by An Garda Siochana in the name of the Director of Public Prosecutions. This dual Garda role of crime investigator and prosecutor in the District Court may on occasion be open to the claim of conflict of interest when a person on a suspended sentence is subject to have his/her case re-entered by a member of the Gardai who exercises the initial function of activation of the sentence, while the same offender may be under active investigation in relation to other offences or may have particular knowledge or "intelligence" in relation to other offences which the Gardai as investigators, would seek to acquire.

In summary, to describe the activation of the suspended sentence and in particular the part-suspended sentence as complex appears to be an understatement. It has been demonstrated how the application to the court for revocation of the suspended sentence has developed to such an extent as to put beyond doubt any claim that automatic activation of the sentence may occur. Once a case has been entered before the court, the court may exercise a discretion to activate or not depending upon the seriousness of the breach. Moreover, the court can determine whether a breach has occurred according to a standard which is less than that applicable for proving a criminal charge. And finally the suspended sentence at common law may never be re-activated unless the prosecution as gate-keeper of the process initiates the revocation proceedings.

CONCLUSION

As observed, the Irish suspended sentence at common law is entirely dependent upon judicial interpretation in the structuring of the sentence.[150] This resulted in the proliferation of different types of suspended sentence in these courts. The formal use of a bond was not always used when structuring the sanction especially in the District Court. While a suspended sentence requires two distinct time elements, namely the period of custody to be served and the period of suspension of that custodial sentence, some Irish sentencers may not pronounce the two critical elements when handing down a suspended sentence. The third element of conditionality is central to the meaning of a suspended sentence as the sentence may not be invoked unless a condition is breached.

Osborough (1982:255) has disclosed that enforcement for a variety of reasons may become exceptionally difficult, that word of the substantive and procedural difficulties is bound to travel among offenders thus making an important purpose of the sanction, the real threat of custody, ineffectual. Criminal lawyers and regular offenders are well aware of the difficulties associated with the re-entry of the suspended sentence, particularly the part-suspended sentence. Some offenders may have had the experience of being placed on a suspended sentence, have breached conditions of the suspended sentence and no further

150 Up to the 2nd October 2006 – Section 99 Criminal Justice Act 2006 introduces a concomitant statutory suspended sentence

sanctions have followed. This is bound to dilute the efficacy of the sanction. The procedures for re-entry, as noted are haphazard and subject to the discretion of An Garda Siochana to seek re-activation. Once a case has been disposed of by way of a prosecution, unless the convicted person is of significant interest to An Garda Siochana, the momentum to have the case re-entered for activation of the suspended sentence is likely to be subject to administrative inertia and nothing further may happen. Moreover, enforcement of conditions attached to a suspended sentence are subject to a series of discretionary practices at the prosecutorial and judicial level, thus introducing a significant discounting feature to the likelihood of actual incarceration, even when breach of conditions of suspension are manifest.

Although there is a lack of information about enforcement practices in Ireland, this chapter has sought to map out the parameters of allowable discretion as recently determined by the Superior Courts. However, the operation of the suspended sentence remains firmly in the domain of the sentencing courts while guided by these recent decisions. The use of part-suspended sentences and the known impediments to the enforcement of the straightforward suspended sentence raise what Osborough has described as an awkward question:

> "Could it be argued that the award of a suspended sentence is nothing more than a symbolic gesture? A bravura performance by the sentencer, which is not intended that anyone should treat too seriously at all – at least not too often?" (Osborough 1982:255).

If however, the suspended sentence is no more than a symbolic gesture as suggested, this study discloses that the sanction is nonetheless used with great frequency in the disposal of cases in all the criminal courts in Ireland. If Osborough`s observation is accurate, then the suspended sentence may present as no more than a marker for future reference in the event that the offender is further convicted .

The pivotal role of the prosecution has also been considered as crucial to the activation process and the discretionary practices of the prosecution are known to sentencing courts when making suspended sentences. Notwithstanding this, the courts appear to be satisfied to invest ownership of the sanction in the hands of the Prosecution which, as a number of

judges remarked, never seeks activation of the suspended sentence where breaches are manifest.

Certain difficulties have been identified in this study concerning the operation of the part-suspended sentence. In particular, the issue of remission of custodial sentences does not comport easily with the calculation of the unexpired suspended part of the sentence. While remission of sentences has always overshadowed the operation of the part-suspended sentence, the study has also identified a critical feature of the remission of sentences which relates to the very power of the Minister for Justice to remit sentences at all.

In the following chapter which deals with the recently introduced statutory form of suspended sentence, it will be observed that certain attempts are made to address these critical issues. While it is expected that the Prosecution will continue to approach the activation of suspended sentences with reticence, the issue of ownership of the sanction henceforth is seen to be jointly vested in the courts as well as the Prosecution. The judges interviewed were especially enthusiastic to utilise the sanction in light of this significant change. It will be argued however that the part-suspended sentence will continue to labour under the shadow of the issue of remission of sentences where some uncertainty may persist.

CHAPTER 7

THE SUSPENDED SENTENCE PURSUANT TO SECTION 99 OF THE CRIMINAL JUSTICE ACT, 2006

INTRODUCTION

In April 2006 the Minister for Justice Equality and Law Reform, Mr McDowell, presented a series of amendments to the Criminal Justice Bill 2004 to deal with a number of pressing criminal justice issues such as the rapid rise in the use of firearms, issues relating to public disorder in the form of Anti-Social Behaviour Orders and issues relating to consistency in sentencing. As a result, a complex series of amendments to the 2004 Criminal Justice Bill were tabled in the Oireachtas which included two sections under part 10 which were headed "Sentencing".[151] By far the most important section is the proposal to give to Judges, as it says in the marginal note, the "power to suspend sentences". Such a proposal to empower judges to suspend sentences in a Bill before the Oireachtas in 2004 may surprise the reader who has read chapters 5 and 6 of this thesis, although as noted, the exercise of such jurisdiction heretofore in Ireland has been based on an assumed inherent jurisdiction by sentencing courts in Ireland since before independence and enduring to date in the Irish Free State and since 1937 with Supreme Court approval (*McIlhagga* 1971, Michael O'Brien –v- The Governor of Limerick Prison 1997 2ILRM p.349). As previously noted, concerns were expressed as to the clear status of the common law procedure (Whitaker 1995) and proposals were made for the procedure to be placed on a statutory footing (Osborough 1992, Law Reform Commission 1995).

Thus, the recent emergence of the statutory suspended sentence under Section 99 of the Criminal Justice Act 2006, must be seen as an attempt to clarify the status of the power to suspend a sentence and to prescribe regulations for the making, maintenance and revocation of such a sanction.

A persistent dilemma facing any researcher when dealing with a topical issue within the criminal justice domain is the very real possibility that the field of enquiry may radically

151 Criminal Justice Act 2006 signed into law by the President on 16th July, 2006. Statutory Instrument 390/2006 fixed 2nd October, 2006 on the Operative date for Section 99 and 100.

alter due to legislative or administrative changes while the enquiry is proceeding. The luxury of conducting an enquiry into historically fixed legal topics is denied the researcher of current issues, who must be capable of adapting the material gleaned to date in order to make sense of any sudden changes in the law whether real or apparent. Such a situation presented to this researcher when considering the operation of the suspended sentence in Ireland thus expanding the field of enquiry.

A literal interpretation of Section 99 suggests that a new power is given to the courts to suspend sentences. However, this view ignores the sentencing jurisdiction already extensively exercised by all of the criminal courts in Ireland on a common-law basis. As no attempt is made within the new statutory arrangement to expressly revoke or abolish the jurisdiction to suspend sentences heretofore enjoyed by sentencing courts in Ireland, a critical question presents to the legal scholar: whether, upon the enactment of Section 99 and Section 100, there continues to exist alongside the new statutory power and procedures for the making, maintenance and revocation of the suspended sentence, a previously established common-law type jurisdiction to suspend sentences?

Besides the dual jurisdictional issues referred to, this chapter sets out to explore a number of features of the suspended sentence which may have been modified or transformed by the incorporation of the sanction in a statutory framework. In particular the search for the rationale of the sanction must be re-visited to discern whether the statutory form of the sanction differs from the common law usage. The ownership of the suspended sentence at common law was presented as a two stage process with the initial judicial ownership passing to the Executive for the purposes of supervision of the sanction. In the statutory arrangement, it will be seen how such ownership of the sanction is now a shared process where judges are obliged to re-enter cases for consideration of revocation. Under the common law system this latter function was exclusively an executive function and only rarely exercised. It will be demonstrated how the statutory prescription of procedures for the making, supervision and revocation of the suspended sentence address a series of difficulties to facilitate the operation of the sanction. So comprehensive are the procedures it is likely that the fractured and ad-hoc procedures used to date to operate the common law suspended sentence will effectively wither and die and will be entirely replaced in practice by the new statutory arrangement.

It will also be demonstrated how the new statutory suspended sentence follows a trend in other jurisdictions to join together different dispositions into one sanction (Criminal Justice Act 2003, England and Wales). This may be achieved by incorporating the role of the probation officer into the suspended sentence and in the case of the part-suspended sentence, the Prison Governor as supervisor of compliance with the conditions attached to a part-suspended sentence. It will be shown how this new procedure effectively provides the final breach between court-based supervision and executive-based supervision of an offender on a suspended sentence, a problem identified in the operation of Butler Orders.

So, the statutory suspended sentence presents a new departure in sentencing policy in Ireland by regulating in quite a different manner the functions of the various actors in the making, supervision and revocation of the sanction. The writer will argue that in the absence of an expressed provision to abolish the common-law jurisdiction exercised by courts heretofore, a dual jurisdiction to suspend a sentence of imprisonment has emerged. The question whether all of the sentencing courts will adopt the statutory procedure exclusively, thereby making a break with the fractured procedures operated to date under the judicially derived suspended sentence, remains to some extent unknown at present. As noted in the preceding chapter, some judges, particularly those exercising exclusive indictable jurisdiction evinced a desire to continue some of the practices such as not using a bond in the making of a suspended sentence or suspending a sentence of imprisonment *simpliciter*, without conditions. The organic development of the suspended sentence in Ireland demonstrates, if nothing else, a robust approach by sentencers to fashion a sanction to meet specific penological requirements such as the future control of the offender, or the avoidance of the imposition of custody. Some of the judges may resist any attempt which may be perceived as a limitation of the practices developed to date. Some evidence of this resistance is revealed in this study, although the extent to which it may endure over time remains unclear. Conceivably, the Court of Criminal Appeal or the Supreme Court may rule that the suspended sentence under Section 99 is henceforth to be regarded as the only valid form of suspended sentence by virtue of its statutory and consequently democratic credentials. However, at the time of writing some of the sentencing judges remain attached to the "old system" and clarity is awaited from the superior courts.

Two Jurisdictions One Sentence

In this section the possibility of the emergence of two distinct sentencing jurisdictions will be explored in more detail. It will be argued that the assumed jurisdiction by the courts in Ireland to impose a suspended sentence, namely the common law jurisdiction, will endure despite the statutory form of suspended sentence introduced pursuant to Section 99 of the Criminal Justice Act 2006. Such claims to the existence of two sentencing jurisdictions to impose a suspended sentence are based upon considerations of constitutional, historical and legislative factors but subject to the rules of construction necessary in such an exercise.

Central to this argument is the claim that the Oireachtas has not sought to resolve the ambiguity concerning the inherent power of the courts to impose a suspended sentence under the common law jurisdiction in the statutory form of suspended sentence enacted pursuant to Section 99. Rather, the Oireachtas has superimposed a statutory form of jurisdiction over an already pre-existing common law jurisdiction without removing the original common law jurisdiction in the same enactment.

It is argued here that there is no clear intention expressed on the part of the Oireachtas to abolish the common law jurisdiction to impose the suspended sentence and to replace it firmly within a statutory framework only. The writer interprets the approach taken by the Oireachtas as an intention on its part not to create an entirely new form of sentence but merely to provide the necessary structures in a statutory format to give effect to such a power. As observed in the preceding two chapters, the construction and operation of the suspended sentence is shown to be distinctly threadbare when the issue of activation of sentence is examined.

A clean break with the old jurisdiction could have been made by a simple amendment within Section 99 providing that all powers heretofore exercised by the courts in Ireland in respect of the making of suspended sentences shall be revoked and abolished and henceforth such powers to make a suspended sentence shall be provided by this Section only or by any statutory amendment made thereafter. The jurisdiction to deal with suspended sentences already in existence upon the enactment of Section 99 could have been provided for by way of a transitional provision, but this was not done.[152] The survival

152 For example, Section 2 of the Non Fatal Offences against the Person Act 1997 introduced a new statutory offence of assault. Section 31 repealed the offence of assault at Common Law but Section 32 allowed a period of transition of 3 months.

of the pre-existing power to suspend a sentence is based upon an interpretation of a series of provisions both constitutional and legislative.

From a constitutional perspective, the jurisdiction to suspend a sentence was exercised by the courts in Ireland prior to the enactment of the Irish Free State Constitution Act 1922 to which the Constitution was scheduled. By virtue of Article 73 of that Constitution the laws actually in force in Ireland immediately preceding the coming into force of the Constitution were to "continue to be of full force and effect" provided such were not inconsistent with the Constitution. The 1922 Constitution continued in force until it was replaced by the current Constitution in 1937 (Bunreacht na hEireann 1937).[153] Article 50 of the Constitution of Ireland provides:

> Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstat Eireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas (Article 50(i)).

Although the power assumed by the criminal courts in Ireland to suspend sentences might not immediately fit into the neat category of the "laws", it has been held that the phrase "the laws" within Article 50 does not refer to statute law only but also encompasses common law offences and rules (The State (Browne) – v – Feran [1967] I.R. 147 Walsh J). It has been argued in chapter 6 that the power to suspend sentences acquired over time a common law persona although its genesis cannot be traced to a period in the far distant past. In fact it is quite recent. But the pervasive use of the sanction, which was twice blessed by the Supreme Court, ensured its continuous existence as a common law practice of lawful credentials. It is therefore argued that if the common law jurisdiction to suspend sentences is not to survive the enactment of Section 99 of the Criminal Justice Act 2006, it is necessary for such a jurisdiction to be expressly abolished in the creation of any new statutory power to suspend a sentence. As noted in chapters 5 and 6, the innovation of the suspended sentence was very much an indigenous Irish disposition which was current before independence in 1922 and survived under the Constitution of 1922 by virtue of

153 The overall effect, firstly of Article 73 of the 1922 Constitution of the Irish Free State and Article 50 of the Constitution of Ireland 1937 seems to have carried forward into Irish domestic law a whole series of enactments of the Imperial parliament which have little or no bearing on the governance of Ireland such as legislation dealing with the colonies (Forde 1987, Hogan and Whyte 1991).

Article 73 under the designation of "laws". Moreover, the practice continued for the next fifteen years and was constitutionally carried forward into Irish domestic law by virtue of Article 50.

At the sub-constitutional level, the operation of Article 50 of the 1937 Constitution of Ireland can be seen to work with particular effect. Consider for example, the formulation of a mini codification of the law (Expert Group 2004:22) relating to offences under the Non-Fatal Offences against the Person Act 1997. In that legislation, the common law offences of assault and battery, assault occasioning actual bodily harm, kidnapping and false imprisonment were abolished by Section 28 and replaced by new statutory offences in the same Act under Sections 2, 3, 4, 5 and 15. This is an example of "the laws in force" being repealed or amended pursuant to Article 50 of the 1937 Constitution although the word used in the Non-Fatal Offences Against the Person Act 1997 is "abolished". One expects the words "repealed or amended" to apply only to statute law, but no issue has been taken by the use of the word "abolished" which was applied to certain former common law offences in the 1997 Act. This may be interpreted as the Oireachtas exercising its legislative function pursuant to Article 15.(2)(i) which provides:

> The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas; no other legislative authority has power to make laws for the State.

The Oireachtas has the power, not only to repeal or amend previous statutory enactments, (including any enactment carried forward from the Imperial Parliament at Westminster or the old Irish Parliament up to the Act of Union of 1800), but also has and does exercise, subject to the Constitution, plenipotentiary powers to abolish where it considers necessary common law offences or any statutory or common law rule of law.[154]

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154 The Oireachtas on occasion has reformulated and adjusted common law rules in legislation, an example of which can be found in the common law rule of doli incapax where the law presumes that a child under seven years of age is incapable of committing a criminal act and a child between seven years and fourteen years of age benefits from a rebuttable presumption that s/he is incapable of crime (Monagle –v- Donegal County Council 1961 Ir.Jur.Rep.37). Section 52 of the Children Act 2001 as replaced by Section 129 of the Criminal Justice Act 2006 provides:-

(1) Subject to sub-section (2) a child under 12 years of age shall not be charged with an with an offence.

(2) Sub-Section (1) does not apply to a child aged 10 or 11 years who is charged with murder, man-slaughter, rape, rape under Section 4 of the Criminal Law (Rape) (Amendment) Act 1990 or aggravated Sexual Assault.

(3) The rebuttable presumption under any rule of law, namely, that a child who is not less than 7 but under 14 years of age is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong, is abolished.

Thus the rule of law of doli incapax is expressly repealed by this statutory provision, an improvement on Section 52 of the Children Act 2001 which relied upon a strong inference that such repeal was effected by that section.

The Criminal Justice (Public Order) Act 1994 presents another variation in relation to the issue of the continuation of common law offences alongside statutory offences. The Act provided a modern statement of the law in relation to the regulation of public order and could be considered a mini codification of the law (Expert Group 2004:22). Specifically, the preamble to the Statute states that the purpose of the Act is "to abolish certain common law offences relating to public order and to provide certain statutory offences relating to public order in lieu thereof". The Criminal Justice (Public Order) Act 1994 partially achieves its objectives by abolishing certain common law offences such as riot (Section 14(4)), rout and unlawful assembly (Section 15(6)), and affray (Section 16(5)) by replacing these old offences with statutory equivalents under Sections 14(1), Section 15(1) and Section 16(1) respectively. These latter offences are rarely prosecuted in the criminal courts but the much lesser offences brought in under Section 4 (public intoxication), Section 5 (disorderly conduct in a public place), and Section 6 (threatening, abusive or insulting behaviour in a public place) feature in the District Court with great regularity. While Section 6 of the Criminal Justice (Public Order) Act 1994 provides a statutory offence for making threatening, abusive or insulting words or behaviour in a public place, the Section makes no reference to the pre-existing common law offence of breach of the peace (Blackstone 1773:142). While the stated intention within the Criminal Justice (Public Order) Act 1994 was said to abolish certain common law offences and this was expressly provided for in respect of certain offences, the offence of breach of the peace survives as a distinct common law offence[155] (Expert Group 2004:46) alongside Section 6 which is the statutory expression of the offence.[156]

Another aspect to consider when dealing with the issue of subsequent statutory formulations of what has previously been considered a common law offence, rule of law or jurisdiction, is the application of Section 14 of the Interpretation Act 1937 which provided:[157]

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155 In A.G. –v – Cunningham (1932) I.R. 28, the Court of Criminal Appeal held that in order to constitute a breach of the peace an act must be such as to cause reasonable alarm and apprehension to members of the public (Quinn 1999:321). Furthermore the same court held that breach of the peace could be tried as an indictable offence, at common law. It is observed that a prosecution for breach of the peace under Section 6 of the Public Order Act 1994 can only be tried summarily.

156 There is one distinct point of difference where the common law offence may also be committed in a private as well as a public place. The commission of such offence in a private place had never been authoritatively decided in the Irish Courts. In the English Courts in McConnell – v - Chief Constable of Greater Manchester (1990) 1ALL ER.423 Purchas LJ stated that "a purely domestic dispute would rarely amount to a breach of the peace. But, in exceptional circumstances, it might very well do so".

157 Repealed by Interpretation Act 2005 (operative from 1st January 2006)

> Where any act, whether of commission or omission, constitutes an offence under two or more statutes or under a statute and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those statutes or at common law, but shall not be liable to be punished twice for the same offence.

This section presupposed the existence of similar statutory offences under different enactments and the co-existence of both statutory and common law offences in respect of the same offence. Moreover, Section 26(1) of the Interpretation Act 2005 provides that where a statutory repeal is made, the enactment thus repealed shall continue in force until the substituted provisions come into operation. This latter provision could be called in support of the proposition that if a common law offence, rule of law or power of the courts to suspend a sentence is not repealed, abrogated or abolished by an enactment which seeks to deal with the issue, then such offence, rule of law or such power is to remain in full force alongside the new statutory provisions, but all times subject to the presumption of constitutionality.

This is precisely what happened to the old common law offences of riot, unlawful assembly and affray which were expressly abolished under the Criminal Justice (Public Order) Act 1994 and which were then replaced by statutory equivalents (Sections 14, 15 and 16 Criminal Justice (Public Order) Act 1994). However, as noted, a different fate befell the offence of breach of the peace which was not abolished by Section 6 and now endures alongside section 6, thus giving rise to a duality, perhaps not intended by the Oireachtas.[158] Although measures to reformulate certain common law offences have been achieved in legislation, this writer contends that the exercise does not proceed on the basis of excluding a number of common law offences which, as demonstrated, still survive unless expressly abolished by the subsequent legislation. This may lead to certain confusion where there is an expectation that legislation which aims at modernising the law in relation to certain offences and regulating these in a codified manner, would not like a glacier leave behind deposits of the common law, but would sweep all before it and replace the legal landscape thereafter with a statutory based regime.

158 Such duality does not invalidate either offence but in this case a certain overlapping or interchangeability does occur.

In terms of regulating the criminal justice system, the Expert Group on the Codification of the Criminal Law made a convincing argument for the paramountcy of legislation as "the only true source of law" other than the Constitution (Expert Group 2004:12). In their criticism of the common law they suggest "… significant portions of the criminal law lacked the crucial element of democratic legitimacy conferred by legislation" (Expert Group 2004:25) and they further suggest *inter alia* "… the need to reinforce the legitimacy of the criminal law through legislative approval" (Expert Group 2004:24). They suggest that the haphazard, unsystematic and disorganised state of the sources of the criminal law in both the common law and under legislation lead to inefficiencies in the criminal justice system. When referring to the French Civil Code, the Expert Group fixed upon the supremacy of legislation and the abandonment of judicial legislation. They stated:

> Hence the moratorium on judicial legislation associated with the modern concept of codification. Although judges were free to interpret the code, they were to be encouraged to seek answers to their problems within its four corners. The code was a symbolic statement about the respective roles of parliament and the courts and should be construed accordingly." (Expert Group 2004:13)

If one applies the above dictum to the emergence of the suspended sentence in Ireland, it is argued that such a practice would not have been permissible within a codified system. It would in effect have been tantamount to judicial legislation. Essentially, the codification of the criminal law, which would include the issue of sentencing, would result in one clear corpus of law to regulate the creation and enforcement of the criminal law. It would not allow for the co-existence of competing common law and statutory offences or jurisdictions within the same legal system. Specifically, upon the making of a criminal code, whether of the general part or the special part, there should be no residue of law remaining from the previous regime which is not integrated fully into the new code as a replacement.

The presumption against implied repeal or revocation by statute is well recognised in statutory interpretation (C.W. Shipping Ltd – v – Limerick Harbour Commissioners [1999] ILRM 416). The courts will favour the survival of common law rights unless the Oireachtas employs clear statutory language where it is sought to interfere with such rights

(Morgan and Hogan 1991:336). Maxwell (1969) states the presumption against changes in the common law somewhat trenchantly when he says:

> It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and could give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended. (Maxwell 1969:116).

If the arguments or the question of interpretation are "fairly evenly balanced", that interpretation should be chosen which involves the least alteration of the existing law. (Reid L.J. George Wimpey and Company Ltd. – v – B.O.A.C. [1955] A.C. 169 at p.191).

Bennion highlights the court's reluctance to accept an implied repeal or revocation of a common law rule when he quotes Roskill L.J. in Jennings – v – U.S. Government [1992] 3 AER 104, that earlier cases which support the argument for implied revocation should be approached with caution since until comparatively late in the 19th century "statutes were not drafted with the same skill as today". (Bennion 1992:116) But Bennion does suggest that courts prefer to treat an Act as regulating rather than replacing a common law rule (Lee – v – Walker [1995] 1 QB 1191) where appropriate. In the latter case the power to suspend committal orders in civil contempt proceedings was reaffirmed as an ancient common law power of the courts but the relevant legislation (County Courts (Penalties for Contempt) Act 1993) and the rules of courts made thereunder merely sought to prescribe the method of its exercise and not to confer jurisdiction. However there can be no doubt that Section 99(i) of the Criminal Justice Act 2006 in Ireland seeks to confer a substantive sentencing jurisdiction upon the Irish criminal courts to suspend sentences although the remaining subsections are essentially procedural in character.

Prior to 1989 Crown Court judges in Northern Ireland exercised a self-professed jurisdiction to impose "recorded sentences" (R.-v-Wightman [1950] N.I. 124.) As already noted, the "recorded sentence" in Northern Ireland and the suspended sentence in the Republic of Ireland have common roots dating before 1922. The Treatment of Offenders Act (Northern Ireland) 1968, which came into force on the 1st May 1969, introduced

suspended sentences in a statutory format which as amended, provides that a suspended sentence must not exceed 7 years and the period of suspension must be between 1 and 5 years duration. In 1989, the Treatment of Offenders (Northern Ireland) Order 1989 came into force on the 3rd of October. Article 8(1) of the Order abolished the power of a court to pass a recorded sentence of imprisonment. Article 8(3) provided that any current recorded sentences would have effect, as if they were suspended sentences which had been made under the Treatment of Offenders Act 1968.[159]

Thus, in Northern Ireland the power to suspend a sentence under statute appears to have co-existed alongside the common law power to "record" a sentence, for a period of 20 years until such common law power was expressly abolished by an Order in Council in 1989.[160]

The "recorded" sentence in Northern Ireland and the suspended sentence in the Republic of Ireland may be regarded as the same type of sanction emanating from a recent common root of title. It is significant that the Treatment of Offenders (Northern Ireland) Order 1989 made specific provision for the abolition of the recorded sentence and the replacement thereof exclusively with the statutory suspended sentence under the 1968 Act. Meanwhile, in the Republic of Ireland, under Section 99 of the Criminal Justice Act 2006, no equivalent legislative provision is evident to indicate the intention to abolish the common law power to suspend a sentence. By a process of induction and based on the history of the "recorded" sentence in Northern Ireland, it is reasonable to conclude that the self-professed jurisdiction of judges in the Republic of Ireland to suspend sentences has not been abolished by the Criminal Justice Act 2006.

Thus, the enactment of section 99 of the Criminal Justice Act 2006 introduces a second jurisdiction to suspend a sentence. The continuous application of two jurisdictions will, no doubt, provide fertile ground for confusion in the making and revocation of suspended

159 The Treatment of Offenders (Northern Ireland) Order 1989

Article 8 – (1) – A court shall not after the coming into operation of this Article pass a recorded sentence of imprisonment on any person or make a recorded order for detention in a young offender centre in relation to any person

160 Dickson observes that Orders in Council made under the Northern Ireland Acts 1974-2000 are published and numbered as U.K. Statutory Instruments. Because they are separately numbered N.I. these collections continue the series of legislation from the Northern Ireland Parliament. Such orders he observes, have to all intents and purposes the status of primary legislation. These orders can also amend or repeal primary legislation which again is contrary to the normal rule for secondary legislation (Dickson 2005).

sentences in the future. One expects however that the statutory suspended sentence under Section 99 will emerge over time as the dominant disposition as sentencers recognise the more advantageous enforcement mechanisms contained in the statutory sentence.

A particular aspect of the statutory suspended sentence under Section 99, which will undoubtedly find favour among the judiciary, is the automatic re-entry of the suspended sentence before the sentencing court upon a further conviction of the accused where the original sentencing court may exercise its discretion to revoke or not to revoke the suspension. However, it may prove difficult to tell them apart when the court is exercising its jurisdiction to suspend a sentence under the common law or statutory procedures unless the recognisance used specifically refers to Section 99 of the Criminal Justice Act, 2006 as the operating jurisdiction. If the court utilises a suspended sentence which is not in strict compliance with Section 99, for example without using a bond, it is argued such a suspended sentence will be permissible as a common law type suspended sentence, but would clearly offend against the statutory suspended sentence under Section 99(1). One can expect such anomalies to arise if the two procedures are used simultaneously or interchangeably.[161]

If uncertainty is to result from the mixed use of the two procedures constitutional issues may arise under Article 38 of the Constitution which require certainty and due course of law.

In summary, it has been argued in the preceding paragraphs that the introduction of a statutory replacement for a common law provision, whether as an offence, a rule of law or a common law jurisdiction or power such as the jurisdiction to suspend a sentence of imprisonment, will not displace the former common law provision unless there is an express provision declaring the abolition of the provision in the statute. As a result, the powers of the criminal courts in Ireland to suspend a sentence of imprisonment will survive and will continue to co-exist alongside the new statutory arrangements for the suspension of sentences. Moreover, any organic practices especially in relation to the making of the suspended sentence at common law, together with the rules of procedure

161 When making a suspended sentence, a judge may not state explicitly which type of suspended sentence s/he is utilising. It may be possible to discern which jurisdiction was utilised once the sentence has been made however. For example, if no bond was used, then the statute has not been complied with (Section 99(1)) but the sentence would nonetheless conform with the common law suspended sentence if the accused verbally gave his/her word to the court to be of good behaviour and to come up for sentencing if called upon to do so. The latter procedure is noted by the court registrar on the court file.

developed for the enforcement of a suspended sentence at common law, will endure in a separate stream of substantive and procedural law alongside the new statutory power to suspend sentences provided for under Section 99 of the Criminal Justice Act 2006.

It is surprising that the Parliamentary Draftsman did not approach the task of providing for a statutory suspended sentence by making clear provision within section 99 to abolish the common law power exercised by the courts to date. This is particularly so in light of the constitutional provisions allowing for the carrying forward of "the laws in force" (Article 73 of the Constitution of Ireland 1922 and Article 50 of Bunreacht na hEireann 1937) of both statutory and common law provisions.

Notwithstanding the introduction of a similar provision already covered by a common law provision, the Oireachtas has not provided for the abolition of the common law provision in the new statutory arrangement. This has been speculated upon as an attempt by the Oireachtas to merely provide a structure or architecture within which the already recognised common law jurisdiction might operate without changing or abolishing such jurisdiction, although Section 99(1) does expressly provide for the granting of such a power to suspend a sentence. Thus, a duality of powers to suspend sentences presents, which may give rise to competition and even conflict between the two jurisdictions.

At the time of writing it is difficult to predict the extent to which sentencing judges will adhere to the strict procedures of the statutory suspended sentence. The beneficial aspects of the sanction, particularly the issue of enforceability, which will be discussed presently, may persuade sentencers to utilise the sanction more frequently. However, as the common law jurisdiction to suspend sentences has not been expressly removed from the sentencing judge's armoury, the practices of the courts to date may well endure alongside the new statutory expression of the sanction. Unlike the Northern Ireland legislation in 1989, a clear opportunity to break with the practices to date was not availed of when Section 99 was presented to the Oireachtas for consideration.

ANALYSIS OF SECTION 99

In order to critically examine the new statutory powers and procedures under Section 99 and Section 100, it might be best to assume that there was no similar pre-existing common law jurisdiction to suspend a sentence or defer penalty and to simply examine the section

within the statutory framework. In taking this critical approach, it may be possible to identify the essential elements of the statutory regime and how these inter-relate one with the other. Moreover, such an approach allows the researcher to proceed with an analysis of the new provisions without being fettered by consideration of issues which remain unresolved within the common law jurisdiction to suspend a sentence as observed in chapters 5 and 6.

However, it has been argued in the previous section that two distinct jurisdictions to suspend a sentence now co-exist. Instead a hybrid or dual approach will be deployed in such an exercise. Firstly, the section or sub-section will be discretely analysed to determine its purpose and secondly the suspended sentence will be subjected to further analysis in light of the developed jurisprudence on the sanction at common law. Additionally, critical material such as articles, reports and the 1967 Criminal Justice Bill will be revisited to discern the purpose and contours of the new provisions with particular reference to any attempt to limit or expand the discretionary elements of the procedure within the new sanction.

LOCATING THE RATIONALE OF THE SUSPENDED SENTENCE UNDER SECTION 99

A crucial issue immediately presents when analysing Section 99 in light of the rationales advanced for the use of the suspended sentence in chapters 5 and 6 and that is: Does the statutory suspended sentence provided for under Section 99 alter the purpose of the suspended sentence from a position which it previously held under the common law regime?

Section 99(1) provides:

> Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

The marginal note describes the Section as a "power to suspend sentence".

On a literal interpretation, the Oireachtas confers a power upon a court exercising any criminal jurisdiction to suspend the execution of a sentence of imprisonment. Such power to suspend a term of imprisonment is conditional upon the accused entering into a recognisance to abide by conditions contained in the recognisance. Such recognisance at a minimum must contain a condition that the accused will keep the peace and be of good behaviour during the period of the suspension for the whole period of the sentence including the custodial part of the sentence, if the sentence is partly suspended (Section 99(2)).

A sentence of imprisonment must first be imposed before the court may suspend the sentence under Section 99(1). In the analysis in chapters 5 and 6 it was noted how this somewhat open-ended wording was subsequently modified and circumscribed in the jurisdiction of England and Wales. First, the *O'Keefe* principles were incorporated into the 1973 Criminal Justice Act to limit the application of the suspended sentence to genuine custodial cases only. Secondly the application of suspended sentences was further limited to exceptional cases only under the Criminal Justice Act 1991 in that jurisdiction. The writer has argued in chapter 6 that under the common law system the courts in Ireland use the suspended sentence widely and in circumstances where the court may not have intended to cause the immediate incarceration of the convicted offender. A suspended sentence for example may be imposed in circumstances where imprisonment was not considered, to cause that person to adopt practices in his/her lifestyle specified as conditions in the recognisance that would deter the offender from further offending at least for the period of the suspension of the sentence.

One judge characterised this feature of the suspended sentence in the interviews as follows:

> "I felt I wasn't quite there yet and I gave him a suspended sentence…if a guy came back to me on another charge and was convicted, the next time he was practically guaranteed a prison sentence".A4J5DC

Section 99(1) continues the requirement that a person must firstly be sentenced to a term of imprisonment (Osborough 1992:222) before a sentence may be suspended. In this respect the formal initial sentence to imprisonment appears similar. However, as observed in the preceding chapters, the *O'Keefe* principles have not been incorporated into Irish case law. Had such incorporation occurred this would have significantly shifted the rationale for the suspended sentence much more closely to a position directly linking the suspended

sentence with the necessity to impose a real sentence of imprisonment in each case rather than as a formal order of imprisonment in many cases. Although, it could be argued that the practices of the Irish criminal courts in imposing a suspended sentence where immediate incarceration is not intended conflict with exhortations by the Whitaker Committee (1985) and the Law Reform Commission (1996) that imprisonment should only be used as a last resort and in serious cases only, in practice, up to recently, the imposition of the suspended sentence carries no greater penalty than the threat of imprisonment, the activation of which is known by all concerned to be quite remote (Osborough 1982, Whitaker 1985).[162]

It should be noted that the power to suspend a sentence under Section 99(1) is not as restrictively defined as the provision in England and Wales under Section 11(3) of the Criminal Justice Act 1973 which incorporated the *O'Kæfe* principles. In the latter section the court is empowered to impose a sentence only in circumstances where "in the absence of any power to suspend such a sentence" (Section 11(3)) a real sentence of imprisonment would have been appropriate. In contrast, Section 99 of the Criminal Justice Act 2006 nominally requires the imposition of a term of imprisonment as a prerequisite to a suspension of a sentence. However, the Oireachtas has not sought to restrict the use of the suspended sentence under Section 99 by further circumscribing the parameters in which a sentence of imprisonment only may be given. Accordingly, Section 99 may be interpreted as providing the courts with the power to suspend a sentence in much the same manner as exercised heretofore under the common law jurisdiction where judicial discretion is not circumscribed by any statutory guidelines other than the requirement that a sentence of imprisonment is first pronounced and given before it may be suspended (Section 99(1)).

The practice in other jurisdictions to limit the power of the court to impose a suspended sentence in exceptional cases only (Weigend 2001, Ashworth 2001) is noticeably absent from the new statutory provision under Section 99(1), (2) and (3). Thus, the dramatic decrease in the use of the suspended sentence in England and Wales should not be expected to occur in the Irish Republic upon the enactment of Section 99. Arguably, the Oireachtas by enacting the suspended sentence within a statutory format in this way is not seeking to limit or cause the courts to move from the sentencing position they have

162 Since 2007 this tendency has changed to one of active revocation under Section 99(9) (Personal observation).

enjoyed and practiced up to now. Indeed, as further proof of the policy of non-interference in the current practices of the courts Section 99(3) provides:

> The court may, when making an order under *subsection (1),* impose such conditions in relation to the order as the court considers-
>
> (a) appropriate having regard to the nature of the offence, and
>
> (b) will reduce the likelihood of the person in respect of whom the order is made committing any further offence,
>
> and any conditions imposed in accordance with this subsection shall be specified in that order.

Section 99(3)(b) clearly advances a policy of special deterrents where conditions may be attached to an order of a suspended sentence and presumably, although this is not clear in the text, incorporated into the recognisance, that the offender comply with conditions tailored to his/her specific criminogenic circumstances. In addition section 99(3)(a) allows the court to have regard to the specific type of offence. Conceivably, this would incorporate offences on a scale of seriousness ranging from the most serious such as manslaughter to the most minor offence but still capable of carrying a prison sentence such as a breach of Section 6 of the Criminal Justice (Public Order) Act 1994.

Besides the open-ended discretion given to a sentencing court to attach a variety of conditions to the order under Section 99(3)(a) and (b), a menu of specific conditions are set out in section 99(4) which can only be made if the sentence is constructed as a part suspended sentence.

Although these conditions appear to apply only to part-suspended sentences, there is no prohibition on a court imposing the same conditions for a wholly suspended sentence since the court's discretion in specifying conditions is so wide.

Section 99(4) provides:

> In addition to any condition imposed under *subsection (3)*, the court may, when making an order under *subsection (1)* consisting of the suspension in part of a sentence of imprisonment or upon an application under *subsection (6*), impose any one or more

of the following conditions in relation to that order or the order referred to in the said *subsection (6)*, as the case may be:

(a) that the person cooperate with the Probation Service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public,

(b) that the person undergo such-

(i) treatment for drug, alcohol or other substance addiction,

(ii) course of education, training or therapy,

(iii) psychological counselling or other treatment,

as may be approved by the court,

(c) that the person be subject to the supervision of the Probation Service.

Thus, Section 99 appears to be remarkably similar to the suspended sentence previously identified in the common law sanction. A sentence of imprisonment must firstly be imposed by a court before suspension may be made. At a surface level, this suggests the avoidance of custody is the primary purpose of the sanction. However, as previously argued the sentence of imprisonment prior to suspension may be more apparent than real, hiding the real purpose of the sanction which is the intention of the sentencing court to engineer the future behaviour of the convicted person by threat of imprisonment if certain specified conditions are not observed.

Supervision of Compliance with conditions of Suspended Sentence

On closer reading of Section 99(4) it reveals a court may impose conditions upon a person while serving the initial custodial part of his/her sentence. This has been a problem in the past especially in relation to sex offenders who refused to partake in therapies and interventions while in custody. Previously Butler Orders were used to ensure a convicted person participated in the appropriate treatment. However, the demise of the Butler Order is clearly anticipated in the new statutory arrangements where under Section 99(13) a Prison Governor is now vested with the discretion to seek revocation of the suspended

portion of a part-suspended sentence prior to the expiration of the custodial part of the sentence. Section 99(13) provides:

> Where a member of the Garda Siochana or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order under this section applies has contravened the condition referred to in *subsection (2)* he or she may apply to the court to fix a date for the hearing of an application for an order revoking the order under *subsection (1)*.

Similarly the Garda Siochana are empowered to seek revocation of the suspended sentence if conditions are not complied with once the convicted person is released from the initial custodial period of a part-suspended sentence or at any time during a wholly suspended sentence. Subsection 13 is constructed in such a way as to vest the supervision of a person while on a suspended sentence or a part suspended sentence firmly in the hands of the Executive. This desirable result was strongly advocated by Keane C.J. in People (D.P.P.) –v – Finn [2001] 2IR 46[163] and appears to have been achieved in this section. However, as previously noted, there is no clear abolition of the common law suspended sentence or the reviewable sentence which became known as the Butler Order within the new legislation. Accordingly it is speculated that the Butler Order may quietly fall into disuse once the provisions of Section 99(13) become accepted by sentencers as the most appropriate method to supervise compliance with conditions by offenders while in the custodial stage of a part suspended sentence.

So, except for deferred penalties which will be discussed later (Section 100), the function of supervision of compliance with conditions of a suspended sentence under Section 99 is now located exclusively within the Executive domain and is subject to Executive discretion and arguably a duty, to seek activation of sentence in the event of any breach of conditions.

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163 Keane C.J. stated in People (D.P.P. – v – Finn) 2001 2I.R. p.46 that "the making of such orders is not merely inconsistent with the provisions of Section 23 of the Act of 1951: it offends the separation powers in this area mandated by Article 13.6 of the Constitution. That provision expressly vests the power of commutation or remission in the President but provides that the power may also be conferred by law on other authorities." And later at p.46 "it would seem to follow that the remission power, despite its essentially judicial character, once vested under the Constitution in an executive organ, cannot, without further legislative intervention, be exercised by the courts". However at page 48 he stated "the court has already pointed out that its observations in this area are necessarily obiter. They are not to be taken as impugning the validity of such sentences imposed by trial judges in cases which have already come before the courts…" (Keane C.J.).

Expansion of Judicial and Executive Discretion

When Section 99 is examined in its totality, the sentencing courts are essentially allowed to proceed with the imposition of a suspended sentence in much the same fashion as heretofore. Essentially the discretionary powers and practices of the court under the common law jurisdiction to suspend a sentence are not restricted by Section 99 and as shall be seen presently, are even extended further by virtue of the Section. Indeed the extra discretions extended to the court under Section 99(10) suggest the court may refuse to revoke a suspended sentence on a much wider basis than that allowed for under People (D.P.P.) – v – Aylmer [1995] 2 ILRM 624 which limited the courts discretion to disregard trivial infractions only. The new discretion is widened to include not only the issue of trivial infractions but now may include consideration of personal circumstances as well as other mitigating issues. Section 99(10) provides:

> A court to which a person has been remanded under *subsection (9)* shall revoke the order under *subsection (1)* unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody (other than a period during which the person was serving a sentence of imprisonment in respect of an offence referred to in *subsection (9)*) pending the revocation of the said order.

A further discretion is introduced in the revocation procedure even where the sentence is revoked. This further discretion allows the court to impose a lesser sentence than that originally specified in the initial suspended sentence.[164] Such discretion is again widely constructed upon a consideration of all the circumstances of the case.

While the provisions of Section 99(10) and (13) at one level deal with the mechanics of activation of a suspended sentence, the subsections also point to an important feature of the statutory arrangement, namely the establishment and maintenance of a control mechanism over offenders while under the threat of the suspended sentence.

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164 In contrast and as noted previously, under the common law jurisdiction to suspend a sentence, once the court decides to revoke the suspension and impose the custodial sentence the period of custody cannot be altered from the original custodial period specified, (People (D.P.P. –v- Ian Stewart , Court of Criminal Appeal, 12th January, 2004).

This control mechanism is constructed upon the additional judicial discretion allowed to a court to disregard a breach, even a non-trivial breach, and to permit the sentence to remain suspended. Under the common law jurisdiction such discretion to ignore a non-trivial breach of a suspended sentence is not permitted (People (D.P.P.) –v- Aylmer [1995] 2 ILRM 624).

The extension of judicial discretion not to activate the original sentence is further evident in the discretion vested in the Garda Siochana, the Prison Governor and the Probation Service as the case may be in Section 99(13) and (14) respectively. Section 99(14) provides:

> A Probation Officer may, if he or she has reasonable grounds for believing that a person to whom an order under *subsection (1)* applies has contravened a condition imposed under *subsection (3)* or *(4)*, apply to the court to fix a date for the hearing of an application for an order revoking the order under *subsection (1)*.

However, in respect of Section 99(9) it should be noted that once the convicted person is brought back before the original sentencing court, such court has the double discretion to disregard the breach having regard to all the circumstances of the case and even if moved to activate the sentence the court may impose a lesser sentence than that originally specified. When taken in their totality, the sum of these discretionary procedures suggests that the court should try to avoid the imposition of custody, if possible. Any application for revocation will include a further plea in mitigation by the lawyer for the convicted person that the breach of the suspended sentence should be disregarded and, as noted, the circumstances which the court may consider are quite extensive. If the court is of the view that activation must take place, a further plea in mitigation may be offered by the lawyer for the convicted person to the effect that the court would not impose the original sentence but rather would substitute that with a lesser sentence under Section 99 (10). The combined effect of the discretionary practices and the triple plea by the defence to withhold a custodial sentence upon the convicted person, points to a significant degree of attrition upon the likelihood of anybody ever receiving the original custodial sentence. Thus, the avoidance of custody may in practice become a significant by-product of the new statutory arrangement such as it is under the present common law jurisdiction but for quite different reasons. Under the statutory arrangements, the discretions are provided for

specifically within the legislation. Under the common law system such discretion while exercised widely by the prosecution was more circumscribed for the sentencing court. By this indirect route, the avoidance of custody may emerge in practice as a significant result of the suspended sentence while remaining less focused as an initial rationale for the suspended sentence within the statutory arrangement. The writer argues that the primary rationale of the sanction is carried over from the common law jurisdiction into the statutory arrangement, where the establishment and maintenance of a control mechanism over the accused is the essential feature of the sanction in preference to any overt policy to avoid the imposition of custodial sentences.

THE MECHANICS OF THE NEW SUSPENDED SENTENCE

Time Issues

In chapter 6, reference was made to the development of organic practices within the criminal courts in Ireland in the construction of suspended sentences. In particular the Circuit and Central Criminal Courts evolved the reviewable and part suspended sentence while the District Court in large measure abandoned the requirement that the accused enter into a recognisance by constructing the suspended sentence conditionally upon the accused not receiving a further conviction. While it has been argued to the contrary, if the new statutory suspended sentence is judged to be a replacement of the common law jurisdiction, then the organic developments referred to above may not survive the requirements of Section 99. On the other hand, certain constraints which presented in the common law jurisdiction may be lifted by the application of the new statutory arrangements.

The practice of imposing a suspended sentence without the requirement that the accused enter into a recognisance clearly offends against the necessity for the accused to do so now under Section 99(1). It will be interesting to see if sentencers in the District Court persist with this type of common law suspended sentence independently of Section 99. However, as observed in chapter 6, the District Court judges were much more enthusiastic about the new suspended sentence under Section 99 because it offered enhanced procedures for revocation in particular, while some of the judges exercising indictable jurisdiction were minded to continue the use of the "old system". Moreover, the statutory suspended

sentence under Section 99(1) constructs the suspended sentence on two specific time elements—the period of the term of imprisonment[165] and the period of the suspension of the sentence (previously referred to as the operative period). In the case of a part suspended sentence, the period of imprisonment and the period of the suspension of the sentence must be specified (Section 99(2) (a) and (b)).

In chapters 5 and 6 the period of suspension of the suspended sentence was discussed in detail. As noted in People (D.P.P. -v- William Hogan (unreported, Court of Criminal Appeal 4th March 2002) Keane C.J.. deprecated the practice of suspending a sentence for a period longer than the custodial period on the basis of the whole risk which the offender must endure for the entire period of suspension. It is arguable that if this jurisprudence which deals with the common law suspended sentence is to be applied to the statutory suspended sentence, it may not have sufficient regard to the extensive discretionary powers now conferred under Section 99 (10) to disregard breaches but more importantly, to allow for a reduction in the custody sentence having regard to all the circumstances and in the interests of justice. This discretion to reduce the custodial period was not permissible under the common law suspended sentence (People (DPP) –v- Ian Stewart unreported Court of Criminal Appeal 18th March 2004). Unlike the legislative provisions made in Northern Ireland and elsewhere to specifically provide for a separate and distinct period of suspension of the sentence, Section 99 (1) and (2) are silent or at best confusing on this issue. Section 99 (2) refers to a basic condition that the offender keeps the peace and be of good behaviour "during the period of suspension of the sentence concerned" but does not limit this period to the period of custody which is suspended. Moreover, Section 99 (1) provides for the power to suspend the custodial sentence "subject to the person entering into a recognizance to comply with the conditions of, or imposed in, in relation to the order". Arguably, such a condition might specify compliance by the offender with conditions such as a condition to take drug treatment for a specified period or to remain away from the victim for a specified minimum period. Thus, the period of suspension under Section 99 may be separately constructed upon the minimum periods specified in the recognizance for compliance with the order of suspended sentence. As noted in chapter 6, most of the judges believed that they had the power to suspend a custodial sentence in excess of the custodial period. Indeed, Keane C.J. in *Hogan's* case (Supra) was careful on this point to state that there are no hard and fast rules applicable.

165 which period has been observed in other jurisdictions as longer in practice than immediately imposed sentences (Oatham and Simon 1972, Tait 1995, Sparks 1971:389).

Thus under Section 99, the operative period is not circumscribed by any limitations for any court imposing a suspended or part suspended sentence. This has importance for a number of reasons. Firstly, the absence of such time limitations may lead to a disproportionate application of the sentence if the operative period is for a protracted period of time which carries the threat of activation of a sentence. Consider the following example. A person is convicted in the District Court under Section 6 of the Criminal Justice (Public Order) Act 1994 for engaging in behaviour likely to lead to a breach of the peace. S/he is given, on a plea of guilty, two months imprisonment (maximum 3 months imprisonment) which is then suspended for a period of 5 years on condition that s/he enter a recognisance to keep the peace and be of good behaviour for a period of 5 years. The maximum statutory jurisdiction of the District Court on conviction for 2 or more indictable offences triable summarily is 24 months imprisonment provided the sentences are made consecutive. Is it reasonable to hold a citizen under threat of a suspended sentence for 5 years or even longer for a summary offence, where the maximum sentence is 3 months imprisonment?[166] Section 99 is not prescriptive or limiting of any court in the construction of the operative period and this may in time lead to difficulties about the reasonableness of the period of suspension. Moreover, when examining this matter one is not without the benefit of a compass as this issue was partially addressed under Section 50(2) of the aborted Criminal Justice Bill of 1967 which provided:

> Where a sentence has remained suspended under this Section for 3 years it shall then cease to be enforceable except in the event of a breach during that period of the condition subject to which it was suspended.

So, in effect under Section 50(2) above, the maximum period for the enforcement of a suspended sentence given by any criminal court would have been 3 years had that provision been enacted. One can only speculate why the draftsman of 2006 omitted this provision limiting the period of enforcement but it may point to a certain deference on the part of the legislature not to unduly interfere in what is traditionally regarded as an exclusively judicial function.[167]

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166 In light of the principle of proportionality , a central tenet of Irish sentencing jurisprudence, a sentence of imprisonment for a maximum period of three months, which is then suspended for five years would clearly breach the principle.

167 While the legislature always set the maximum custodial sentence applicable to a specific offence, the courts are allowed a complete discretion to apply the sanction up to the maximum provided in the statute. Certain offences however attract a mandatory sentence such as murder – a term of life imprisonment, while other offences attract a presumptive

Although Section 50 (2) seeks to limit the maximum period during which a suspended sentence may be enforced, conceivably it would have been possible to construct a suspended sentence under Section 50(2) which was suspended for exactly the same period as the custodial period but which was in excess of 3 years. In those circumstances a sentence would have been unenforceable but nonetheless valid. Thus a limitation upon the period of enforcement may not necessarily be equivalent or co-terminous with the limitation upon the period of suspension.

Section 99 also liberates a suspended sentence made in the District Court from the strictures of a six month time limitation of enforceability under Order 25 Rule 4 of the District Court Rules 1997. This comes about as a result of the absence within the section of any specific reference to the District Court being governed by different procedural rules. The 1948 and 1967 District Court Rules, as noted in chapter 6 limit the enforcement of the suspended sentence to within 6 months of the order or within 6 months from the date for the fulfilment of a condition within the order respectively. Osborough (1982) correctly identified this as a substantive issue hidden within a procedural rule, as the rules making committee are empowered only to prescribe procedural rules and forms. However, under Section 99 the District Court is no different from any other court exercising criminal jurisdiction and any attempt to limit the enforceability of its orders by a rules making committee must be considered *ultra vires* the Act and would not be permissible. When writing earlier, O'Malley (2000:295) had expressed approval for the extension of a time limitation for all courts upon the enforceability of a suspended sentence as similarly provided for in the District Court Rules 1997. Moreover, this was further advocated by the Whitaker Committee in 1985 and the Law Reform Commission in 1996 when they urged the enactment of provisions similar to those contained in the 1967 Criminal Justice Bill (Sec 50). These recommendations to place a time limit upon the enforceability of a suspended sentence are noticeably absent in the statutory arrangement contained in Section 99.

Another time element of the new suspended sentence may be identified in the procedures prescribed for revocation of the suspension of the sentence. Section 99(9) provides that

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minimum term of imprisonment (Section 15(a) Misuse of Drugs Act 1978-2006. Clearly, the legislature could have provided a maximum period for the operation of a suspended sentence but failed on this occasion to do so. Thus, the courts have a very wide discretion when constructing the operative period.

the court which convicts the offender for a subsequent offence shall return the offender to the original sentencing court for further consideration by that court on the matter of revocation.

Moreover, Section 60 of the Criminal Justice Act 2007 requires the subsequent court to remand the convicted offender back to the original court for consideration of revocation of the suspended sentence. The consideration of revocation must be completed by the original court before the subsequent court finalises its own sentence. If the original court revokes the sentence and imposes the custodial sentence originally contemplated, or a lesser term, then the accused is returned to the subsequent court for consideration of sentence and if that sentence is also a custodial sentence such sentence must be consecutive by operation of law. There appears to be no discretion open to a judge who imposes a custodial sentence consequent upon the revocation of a suspended sentence by the original court to make the custodial sentence concurrent.

However, Section 99(9) is quite clear on the time issues. The subsequent conviction must be pronounced within the period of the suspension of the original sentence. Otherwise it appears, notwithstanding that the offender may have committed an offence within the period of suspension of the original offence, s/he is not amenable to further sanction as the subsequent conviction was not obtained within the same period. On the other hand, Section 99(13) and (14) seem to allow for the possibility that a person placed on a suspended sentence may be amenable to revocation upon a complaint being made by the Garda Siochana, the Prison Governor or the Probation Service during the period after the expiration of the suspended sentence. Subsections (13) and (14) are unclear as to the time limits within which a complaint may be made. The words "has contravened" may be read as "is at present contravening" in the sense of a person who continually fails to comply with a condition which requires to be observed over a period of time, for example a condition that s/he attend at a drug treatment centre or sex offenders programme. Alternatively, the words can be read literally to mean that a breach has occurred at any time even at the last hour of the period of suspension. But the subsections do not prohibit the making of a complaint after the expiration of the period of suspension or the imposition of the suspended sentence after the period of suspension has expired.

As noted, the procedure under Section 99(9) is mandatory on the court whereas procedures under Section 99(13) and (14) are discretionary on the part of the Garda Siochana, the Prison Governor and the Probation Service. It is not quite clear why the activation of the suspended sentence would continue to be enforceable after the expiration of the period of suspension under Section 99(13) and (14) but would not be so enforceable under Section 99(9). Moreover, except for the general case law applicable in respect of the issue in delay in taking prosecutions (The State (O'Connell) – v -Fawsitt 1996 I.R. 362) and delay within the courts in dealing expeditiously with cases (People (D.P.P) – v – Arthurs 2000 2 ILRM 363), there is no time limit at all applicable in respect of cases brought back for revocation under Section 99(13) and (14). This precise time limitation was anticipated in the 1967 Bill where under Section 50(2) which provided that all suspended sentences no matter how long would be unenforceable after 3 years "except in the event of a breach during that period of a condition subject to which it was suspended" (Section 50(2)). Thus, notwithstanding the strict time limit placed on enforceability under Section 50(2) of the 1967 Bill, there was to be no ambiguity on the making of a complaint for breach after the same period had expired.

So, besides the issue of conditionality which will be discussed in the next section, the other critical component of the new statutory suspended sentence is the issue of time limits and the duration of the sanction. A revocation of a suspended sentence pursuant to Section 99(9) and (10) must commence with a subsequent conviction obtained within the period of suspension (Section 99(9)). A subsequent conviction obtained after the period of suspension, but in respect of an offence committed during the period of suspension is not amenable to the revocation process under Section 99(9). On the other hand the Garda Siochana, a Prison Governor or a Probation Officer may apply for a revocation of a suspended sentence at their discretion after the period of suspension has expired on the basis that the offender "has contravened" a condition of the suspended sentence. Thus, the time limits are quite circumscribed for the mandatory procedure (Section 99(9)) where a court must remand a convicted person subject to a suspended sentence, but the time issues are apparently open-ended for the discretionary procedure under Section 99(13) and (14).

However, the time limits discussed above relate to the periods during which an application to revoke a suspended sentence may be made. Somewhat different time considerations

may apply when the court is asked to deal with an application to revoke a suspended sentence. First, it is observed that an offender may not be liable to have a suspended sentence revoked in respect of an offence committed by him/her before s/he entered into a recognizance to keep the peace (Mark McManus –v- Judge O'Sullivan and D.P.P [2007] IEHC 50 Dunne J.). Paradoxically this is so notwithstanding the mandatory obligation (Section 99(9)) upon a subsequent court to remand an accused back to the original sentencing court which imposed the suspended sentence. This paradox may be explained when the issues of time are discreetly examined. Section 99(9) obliges a subsequent court to remand the person subject to a suspended sentence back to the original court for consideration of revocation. However, the original court may not revoke the suspended sentence if the offence for which s/he was convicted before the subsequent court was committed prior to the accused entering into the recognizance. The accused simply could not be bound over in respect of matters prior to entry into the bond. Secondly, the High Court in *McManus* (Supra) has declared that there is no "hard and fast rule" to govern the issue of activation of a suspended sentence which is outside of or in excess of the operational period. The period may be exceeded for a number of reasons not all of which may be attributed to the prosecution. Indeed, the High Court speculated on a number of reasons for delay which may clearly accrue to the benefit of the defendant. A defendant may wish to call witnesses or to produce reports and may require the case to be put back thus causing delay, indeed the operational period might run out as a result of such adjournments. In those circumstances, it may be appropriate to allow the revocation application to proceed notwithstanding that the operational period has expired. Critically however, the breach of the suspended sentence must have been committed during the operational period and during the period specified in the bond. Therefore it is essential that the period specified in the bond and the operational period are coterminous from beginning to end.

It is argued here that O'Siochain's dictum that on the expiry of the period of suspension "there is a complete discharge" (O'Siochain 1977:27) must now be interpreted as subject to the provision of subsections (13) and (14) which allow for reactivation of a suspended sentence at any time including any time after the expiration of the period of suspension, provided the breach has occurred within the period of the suspension. In the years ahead one can expect further litigation on this point.

CONDITIONS

Besides the time elements of a suspended sentence, in chapters 5 and 6 it was observed that the suspended sentence is essentially an agreement between the court and the convicted person, that the court will forebear from the imposition of a custodial sentence provided the convicted person agrees to abide by specified conditions in his/her recognisance. As previously proposed under Section 50 of the 1967 Criminal Justice Bill, the centrality of conditions attached to a suspended sentence is a defining characteristic of the new statutory suspended sentence under Section 99. The construction of the sentence upon conditions to be observed helps to define the purpose of the sanction as well as defining (time elements apart) the circumstances upon which the suspension becomes forfeit and the original custodial sentence activated. Section 99(2) provides that at a minimum, every suspended sentence must contain a condition that the convicted person keeps the peace and is of good behaviour. As noted previously in the case of Dignam – v – Groarke and DPP 17th November 2000 I.E.H.C. a breach of the peace need not amount to a criminal act and the standard of proof is not that of the court exercising full criminal jurisdiction.

Section 99(3) and (4) build upon the foundations of Section 99(2) where a sentencing court may tailor the suspended sentence specifically to the circumstances of the offence and the offender. Section 99(3)(a) suggests an open-ended approach to the type of conditions which may be attached, such as a condition to restore a loss suffered by a victim following a theft, fraud, criminal damage or assault, and in this respect conditions specified under Section 99(3)(a) do not primarily have the character of crime prevention measures or conditions which seek to change the underlying factors in the offender's behaviour such as drug addiction. Instead restitution as an aim of sentencing is strongly suggested under this subsection. Besides considerations relating to restitution under Section 99(3)(a) all other conditions either suggested or specified in Section 99 are crime preventative in nature. The governing principle which the court must consider in formulating any extra conditions other than the basic condition under Section 99(2) is that the condition is appropriate having regard to the offence and will reduce the likelihood of re-offending. However this appears to be as broad as it is long. Would the section, for example, allow a court to establish one of Foucault's "tiny theatres of punishment" (1977:113) by sentencing a person for breach of Section 6 of the Criminal Justice (Public Order) Act 1994 to a sentence of 2 months imprisonment suspended provided that s/he at a certain time would

present outside a certain fast-food outlet to clean up the detritus of the night before while at the same time wearing a sign that s/he had contributed to such a mess in the commission of an offence? While the word "appropriate" is used in Section 99(3)(a) it is suggested here that "appropriate" must be tempered by the principle of proportionality as developed in People (D.P.P.) – v – M [1994] 3 IR 306. Whatever condition is imposed, such condition must be proportionate to the offender and to the offence.

In chapter 6 a discussion took place about the previous practice of sentencing courts obliging the offender to leave the jurisdiction or to suffer a custodial sentence if s/he remained. Noted also were the conviction rates among single young Irish males in Britain in the 1950s and 1960s some of whom may have arrived in that jurisdiction consequent upon such orders in this jurisdiction (Russell 1964:146, Ryan 1990, Kilcommins *et al* 2004). The Criminal Justice Bill 1967 (Section 50(1)(a)) specifically sought to prohibit the imposition of a condition restricting the person's choice of country of residence and the decisions of the Court of Criminal Appeal in respect of such conditions in the cases of D.P.P. – v – Alexiou [2003] 3 IR 513 and D.P.P. –v – Dar C.C.A. 14th February 2006 have been noted. The case law developed by the Court of Criminal Appeal appears to allow a condition to be attached to oblige a convicted person to leave the jurisdiction as a condition of a suspended sentence, provided the convicted person has no real connection with the State or has no right of establishment under EU Treaties and provided the period is not overly long or in perpetuity. Whereas previously Section 50(1)(a) of the 1967 Bill sought to prohibit the forced migration of Irish offenders to Britain, the absence of a similar provision in Section 99 of the Criminal Justice Act 2006 may allow courts, in certain circumstances, to apply such conditions in respect of persons who do not have a right of establishment under EU law and have no real connection with the Irish State. In the context of significant inflows of economic migrants and asylum seekers into the State since the early 1990s one can expect that a convicted person from such a category of offenders may continue to be subject to conditions to leave the jurisdiction. Indeed, Section 99(3)(b) could on a certain reading allow for such a disposal.

Although Section 99(4) is quite targeted at specific interventions to promote the rehabilitation of a convicted person sentenced to a part suspended sentence, especially during the custodial phase of the sentence, as noted earlier, these same conditions may be applied to the wholly suspended sentence under Section 99(3).

Generally speaking, the Legislature has invested the Judiciary with a wide discretion when it comes to the construction of conditions which may be attached to a suspended sentence. Significantly they have not sought to circumscribe the power of the courts to attach any condition. Provided it is appropriate and is aimed at reducing the likelihood of offending it is permissible. Again, one may observe a certain deference by the Legislature to the Judiciary in allowing so wide a discretion in the construction of conditions which may be attached to a suspended sentence.

In summary, the suspended sentence under Section 99 is always subject to conditions. At the very least it is a condition precedent to the making of every suspended sentence under Section 99 that the offender enter into a recognisance conditioned that s/he keep the peace and be of good behaviour (Section 99(2)). Section 99(3) and (4) allows the court to specify conditions appropriate to the offender's circumstances and the offence itself. But the distinct possibility may arise that a court could specify conditions which might be disproportionate to the offence and unsuited to the offender's circumstances. The now defunct condition that an Irish offender should leave the jurisdiction or suffer a custodial sentence instead, may re-emerge in respect of non-European Union nationals convicted of serious crimes. As noted, Section 50 of the Criminal Justice Bill 1967 sought to prohibit such a condition , but this provision was not repeated in the present legislation . The Alexiou case (supra) at common law does however permit such a condition to be attached to a suspended sentence.

ACTIVATION OF SENTENCE

The suspended sentence in Ireland is enhanced by the provision of clear procedural rules which provide for the establishment, maintenance and revocation of a suspended sentence under Section 99 of the Criminal Justice Act 2006. The provision of these procedures within the statute itself is perhaps the most significant contribution which the section makes in respect of the suspended sentence. Heretofore, under the common law jurisdiction, the procedures for making and revoking a suspended sentence were based upon the application of principles of natural justice, a mosaic of case law precedents and a few limited District Court rules. The Legislature has seen fit to prescribe procedural rules applicable in the making and revocation of a suspended sentence in a statutory form

without delegating this function to secondary legislation to be settled by a rules making committee for each court level. As a result, the same procedures shall now be applicable for each court level and except for the provision of forms for a notice of re-entry under Section 99(13) and (14) as provided for under Section 99(15) there is no other function to be performed by any rules making committee. The procedures are so comprehensive that even the method of service, a function usually reserved for a rules making committee, is clearly prescribed in Section 99(18) as is the procedure for the issuance of a warrant (Section 99(16)) if the convicted person fails to appear on notice of an application to revoke the sentence.

A previous criticism of the suspended sentence was the absence of a clear mechanism for automatic re-entry upon breach or upon further conviction. Section 99(9) now obliges a court to remand upon bail or in custody back to the original court a person subject to a suspended sentence who is convicted of a subsequent offence. However, despite its mandatory aspect, it is critical for the prosecution to apply immediately to have such person so remanded and for courts to comply with such requests, otherwise the automatic feature of re-entry will fail. Alternatively the court of its own motion and without request of the prosecution must make such a remand (Sec. 60 Criminal Justice Act 2007).

Every condition to which a suspended sentence is subject must be clearly specified in the court order under Section 99(2), (3), (4) and (5) and copies of the court order must be given to the Gardai under Section 99(7)(a) and a prison Governor where a part suspended sentence is imposed and the Gardai under Section 99(7)(b). Where the Probation Service are included in an order, they are also to be given a copy of the order containing all of the applicable conditions. It appears that the order of the court which contains all the relevant conditions attached may not be the same document as the recognisance entered into by the convicted person. Clearly the convicted person can only be subject to the conditions contained in his/her recognisance which s/he is obliged to sign in court prior to his/her release but there is no mandatory provision in the statute providing that s/he be given a copy of such recognisance upon signature and release. It could be argued that his/her signature upon the bond is sufficient notice to him/her but best practice suggests that s/he be given a copy of the bond to take away with him/her for further reading. Rules committees might address this issue in due course.

Besides placing the suspended sentence on a statutory footing, thus giving the sanction a clear status as advocated by Whitaker (1985), the second recommendation by Whitaker on enforceability has also been addressed in Section 99. The Whitaker Committee had recommended that if the issue of enforceability was addressed then the courts would favour using the sanction with greater frequency. The great danger of course is that courts may favour using the sanction more often instead of imposing fines and probation, especially where the courts may have an increasing level of confidence that breaches will be brought back to the court for activation or for the consideration of penalty. As a consequence, if courts commence using the new statutory suspended sentence with greater frequency than they have to date under the common law jurisdiction, and if as a result of the new procedures for activation, a greater number of breach proceedings are re-entered before the courts, it is more likely than not that the overall prison population will increase as a result of the use of the new measures.[168]

The probability of a rise in the prison population resulting from the greater use of the suspended sentence in light of the enhanced revocation procedures provided for under Section 99 was specifically addressed by one judge in the interviews where he stated :

> "I think initially both the decoupling of community service from the custodial requirement and the use of the suspended sentence under the new act of 2006 might have that effect [of increasing the number of persons committed to prison upon breach], but I think the sooner the better the system

[168] When community service orders were originally introduced in 1984 a clear pattern of experimentation by the judiciary could be detected, especially in the initial five year period following its introduction. (Jennings 1990) The Irish judiciary are likely to follow the same pattern upon the introduction of the statutory suspended sentence, especially if, as Whitaker (1985) anticipated, the issue of enforceability is rectified by automatic re-entry of breach of a suspended sentence upon subsequent conviction. This "infirmity" has now been removed by Section 99(9). In consequence, the criminal courts are likely to have a far greater recourse to the use of the sanction. On aggregate, if the number of suspended sentences made each year is to increase then the number of breach proceedings will inevitably increase also, a certain amount of which will eventually result in the imposition of the original or substantially similar custodial sentences (Section 99(10)). Studies from other jurisdictions on breach rates and the treatment of breaches by the courts are instructive on this point. Bottoms estimated that of those given a suspended sentence in England and Wales, 30% had their sentence activated over time (Bottoms 1987:189) while Sparks put his estimate at 35%. Sparks had estimated that 40% of those given a suspended sentence would be reconvicted during the operational period and of those convicted between 84% and 90% had their suspended sentence activated either in whole or in part (Sparks 1991:391). However, in Victoria, Tait found that a total activation rate of only 10% was evident. He ascribed the difference with the English rates to the length of the operational period which was limited by statute to a maximum of 12 months in Victoria, whereas in England and Wales at that time, the operational period could be fixed for up to 3 years. Interestingly, Tait's finding of 10% activation rate corresponded with a sub-group within Sparks study where the operational period was limited to 12 months also. The likelihood of the breach of a suspended sentence increased with an increase in the period of suspension (Tait 1995:154 – 155). Additionally, Tait found that the original sentence of imprisonment which he estimated was inflated by virtue of its suspension, would be reduced somewhat upon activation on a discretionary basis by the judges to reflect the sentence that would have been imposed if an immediate sentence of imprisonment had been given (Tait 1995:155). This possibility also presents in Irish sentencing practice and Section 99(10) provides for a wide discretion to sentencers when considering activation upon breach. However, the overall effect of the new statutory suspended sentence in Ireland may be to increase the length of the custodial period to be served when Section 60 of the Criminal Justice Act 2007 is taken into account. This requires as a matter of law that any subsequent sentence imposed upon breach must be consecutive. The possibility of judicial discretion is removed in this arrangement.

> starts to operate that where there are breaches of suspended sentences, that the accused are brought back to court quickly and dealt with quickly and if sentences are imposed, then, I think word will travel and I think it might then have the desired effect of lessening the number of people going to prison. But I think until recidivists see that a system is actually working, they will work the system". A2J1DC

It is interesting to note the use of the phrase "word will travel" yet again in the context of the consequences of a suspended sentence. As previously noted in chapter 6, the phrase was also used by Osborough in 1982 although for precisely the opposite reason – that the *cognoscenti* of the criminal community believed that the suspended sentence once made could have no adverse consequences.

However, the concern remains that an increase in judicial enthusiasm to make more use of the suspended sentence may import into Irish sentencing the same malfunction which Sparks identified in the sanction when it was initially deployed in England and Wales (Sparks 1971). The qualitative data in this study shows that Irish judges are now more confident that suspended sentences will mean what they say and that such sanctions are not as previously characterised as "a let off". There is no evidence in the responses from the judges to show that the process of selection of candidates for a suspended sentence is any different to the practices in other comparable jurisdictions. More first time and shallow end offenders may have their cases disposed of by way of suspended sentence and seasoned offenders may be treated more harshly, thus giving rise to a bifurcatory pattern (Tait 1995:150). But if first time offenders are more frequently placed upon a suspended sentence rather than probation or upon conditional release or given a fine, they are potentially placed at greater risk of incarceration upon breach, especially when breach procedures are significantly enhanced. It is speculated here that this trend may occur despite the application of a judicial discretion at three separate stages of the procedure, not to impose a custodial sentence.[169]

In Chapter 6, the activation of the part suspended sentence at common law was discussed in detail. In particular, the prisoner's entitlement to remission of sentence for good

169 The court will have heard three separate and sequential submissions in mitigation by the lawyer for the accused that the breaching offender would not receive a custodial sentence. The first stage occurs at the original sentencing in court. The court having imposed a custodial sentence there and then suspends the sentence in whole or in part. The second stage occurs when the court, upon an application for revocation, decides to ignore the breach, even a non-trivial breach, and to allow the continuance of the suspension of the sentence. The third stage may occur where the court decides at a breach hearing that the suspended sentence should be activated. However, the court is empowered to impose a lesser sentence than that originally specified and suspended (Section 99(10)). Thus, the possibility of a full custodial sentence may be further mitigated.

behaviour was clearly settled in the *O'Brien* case and this was not adversely affected by subsequent changes in either primary or secondary legislation relating to prisons (Prisons Act 2007 and Prison Rules 2007, Rule 59, S.I. 252 of 2007). Section 99(19) Criminal Justice Act 2006 states that the operation of Section 99, which includes the power to make a part suspended sentence, shall not affect the operation *inter alia* of Regulation 38 of the Rules for the Government of Prisons 1947. Notwithstanding the legislative attempt to protect the entitlement to remission under Regulation 38 (now replaced by Rule 59 Prison Rules 2007), a clear difficulty presents in calculating the "sentence" which is to be subject to remission. On the facts presented in the *O'Brien* case, was the Executive to calculate the "sentence" as the custodial part of the sentence of four years or for the full period of ten years which would have encapsulated the entire sentence? In the event, the Supreme Court granted *habeas corpus* on the basis that the prisoner was in illegal custody having earned entitlement to release for good behaviour after three years. The Supreme Court adopted the former view in respect of the issue of remission.

The difficulties presented in the *O'Brien* case look set to endure into the statutory arrangement for part suspended sentences. This problem could have been addressed if provision had been made in the Criminal Justice Act 2006 or in secondary legislation to amend the effect of Rule 38 of the rules for the Government of Prisons 1947 to allow for the separate and discrete calculation of remission for the prisoner serving a part suspended sentence where the prisoner, having served his/her initial sentence is again committed to prison upon breach.[170]

The case of Michael O'Brien – v – the Governor of Limerick Prison [1997] 2 ILRM p.349, presented two inextricably linked issues only one of which has been addressed in statutory provisions. It is argued that without statutory or regulatory amendment, the future operation of the statutory part suspended sentence under Section 99 may remain uncertain.

The precise difficulty which presented in the *O Brien* case was not adverted to by any of the judges interviewed. The judges who make use of the part suspended sentence are almost exclusively in the Circuit and Central Criminal Courts. They believed that the suspended

170 Section 99 (19) of the Criminal Justice Act 2006 provides:

> "This section shall not affect the operation of (a) Section 2 of the Criminal Justice Act 1960 (relating to temporary release) or Rule 38 of the rules for the Government of Prisons 1948 (S.R.S. and O.320/1947).

part of a part suspended sentence was efficacious in the control of the released offender when they stated:

> "What you are really thinking then is a. he has paid for the penalty; b. he will have learned his lesson with the custodial sentence; c. if he misbehaves when he is released from custody he will be brought back". A3J1CC

> "…the prison effect and the deterrent effect is probably achieved by a relatively short period in jail. You [are] maybe encouraging the deterrent effect and then maximising it by having the person under control when they come out… the partially suspended sentence at least gives you an input later on…" A5J1CC

But one judge of the District Court hinted at enforcement difficulties when he said:

> "I am not sure that I am in favour of the part suspended sentence…everybody would seem to appear to me to be unsure as to how to operate a part suspended sentence"A6J1DC.

The activation of the part-suspended sentence developed under the common law jurisdiction has always presented a particular difficulty. As a statutory provision, up to 1997, Section 1 of the Prison (Ireland) Act 1907 prevailed over the common law jurisdiction to grant a part suspended sentence thereby rendering such dispositions of questionable status. But uncertainties remain on the calculation of remission under the new statutory arrangement.

The Probation Service and the Suspended Sentence

Besides the issue of time limits in the activation of the suspended sentence which was discussed earlier, the exercise of certain discretionary functions will, in future years, define the suspended sentence as constructed under Section 99. While the re-entry of a suspended sentence upon a subsequent conviction and during the period of suspension is mandatory upon the courts, Section 99(10) allows the court a wide discretion to ignore the subsequent conviction and even where the court is moved to revoke the suspended sentence it may replace it with lesser term of imprisonment than originally specified.

The reactivation of a suspended sentence under Section 99(13) and (14) upon complaint for breach of a condition made by a member of An Garda Siochanna, a Prison Governor or a Probation Officer is clearly specified as a discretionary function on the part of each of

these agencies. But perhaps the most significant change brought about by Section 99(14) is the implied coercive role of the Probation Officer to ensure compliance with conditions by an offender under a suspended sentence. The Probation Officer under Section 99(14) presents primarily as a direct agent of the court to ensure strict compliance with conditions attached to a suspended sentence in contrast with the earlier manifestation of the Probation Officer who was there to advise assist and befriend the accused (Section 4 Probation of Offenders Act 1907). The future functioning of Section 99(14) may present another paradigm shift for the Probation Service in Ireland[171] where the application of a previously pronounced sentence i.e. the suspended sentence, can be invoked to ensure compliance by client/offenders with interventions and programmes provided by the Probation Service.[172] Earlier chapters noted the challenges which the introduction of the community service order presented to the Probation Service in Ireland especially in relation to issues of non-compliance with the order and the degree of discretion considered necessary to ensure compliance with the order. But, in a sense the community service order was relatively uncomplicated insofar as the real issue of compliance was the attendance for and performance of unremunerated work by the client/offender. While the alternative sanction of imprisonment in the Irish community service order is known in advance, the Section 99 suspended sentence also has a known custodial sentence attached to it. The performance of conditions pursuant to Section 99(3) and (4) presuppose an intervention in the client's/offender's behaviour and lifestyle which, it is argued here, is much more demanding and fundamental in character than merely turning up at a community service scheme and performing unpaid work. The test of compliance pursuant to Section 99(3) and (4) might include a period of drug or alcohol-free living which the client/offender may never be able to achieve, despite interventions at a treatment programme. The value judgements which the Irish Probation Officer will be called upon to exercise in relation to this new regime, it is argued, may redefine the role of the Probation Service and provide the final break from their traditionally defined role as social workers. Henceforth, if this section is used widely and the Probation Service are inducted into the supervision of such orders, the function of the probation officer as penal

171 Consider the following example – an offender/client is placed on probation for 2 years having been convicted of unlawful taking of a motor car, contrary to Section 112 of the Road Traffic Act 1961. The offender has a drug dependency problem. The Probation Officer may use all manner of strategies to induce the offender to seek treatment and finally may breach the offender if s/he fails to co-operate. The final disposal of the case by the court is unknown before the breach is invoked. In the case of a suspended sentence under Section 99, if a probation officer is involved in the sentence, the Probation Officer may seek a revocation for non compliance with conditions but in this case the final disposal of the case is known in advance i.e. a custodial sentence of definite duration (subject to judicial discretion).

172 The Probation Service provide assistance to offenders committed to prison. However, an offender sentenced under a suspended sentence under Section 99 is significantly beholden to the Probation Officer to exercise discretion when breach occurs. In contrast, the committed prisoner is already incarcerated and need not give the same level of commitment to a rehabilitation programme.

agent and enforcement officer will advance and the role of the social worker will recede (Nellis 2004:14).

Indeed in Halton's study of change in the Irish Probation Service (2007) which was conducted just before the statutory suspended sentence was introduced, her probation officer respondents universally identified the shift away from the traditional social worker's perspective towards that of controlling agent in the criminal justice system.[173]
One of her respondents concisely stated :

> "Increasingly, our role is that of containment, this conflicts with the caring/ supportive side of our job"PWO12.

While another reflected upon the difficulties of balancing organizational, professional and ideological challenges thus:

> "I would say that our employers have no interest in the welfare perspective, or little interest. We now "assist in public safety". Everything we do is measured against controlling the offender and limiting the misbehaviour, so that the community is safer. The measurements are clear measurements of crime reduction… I think that the language at any rate at the moment is a language of "control" rather than a language of "encouragement" or "engagement", not to mention "counselling" (Spwoy-Halton 2007:186).

Such concerns expressed above by Irish Probation Officers will be magnified by the induction of the probation service into the supervisory function of the suspended sentence under Section 99(4).

173 The study points to a significant measure of professional orientation where 47% of participants located "care" as their first priority of practice and not one probation officer indicated "control" as a first priority in practice.

Imposition of Fine and Deferment of Sentence

Section 100 of the Criminal Justice Act 2006 introduces a new concept where the sentence may be pronounced and then deferred for a period, but the sentence must also be accompanied by the imposition of a fine. While the imposition of a fine is a condition precedent to the use of the deferred penalty under Section 100, the level of fine is not defined and it is argued that such a fine might well be fixed at a nominal level merely to allow the use of the deferred penalty under Section 100.

Consistent with the statutory suspended sentence under Section 99, the deferment of penalty as provided for in Section 100 does not displace by way of a statutory amendment the previous power of the courts to defer the issuance of a warrant conditionally upon the offender not receiving a further conviction within a specified period. Thus it would appear, in the absence of such provision to abolish the common law sentencing practice, particularly in the District Court, there now emerges two distinct deferment of penalty procedures. The new statutory process is quite circumscribed by time limits and is conditional upon the consent of the accused, whereas the common law procedure does not require a consent of the accused to be given prior to the deferment of the sentence and is not limited by a six month rule where the order of sentence cannot be made "later than six months after the making of the order". As noted in chapter 6, the District Court frequently makes a hybrid deferred sentence/suspended sentence by specifying that the sentence of custody is not to be served by virtue of the warrant of execution being withheld, provided the accused does not receive a further conviction within a specified period e.g. two years. No consent is called for in this procedure and the time limit for the suspension of the sentence or the deferral of the sentence is not limited even by the District Court Rules, Order 25 Rule 3 and 4. In all other respects the operational structure of Section 100 is similar to the statutory suspended sentence in Section 99.

But what can the legislative intention be in introducing Section 100 of the Criminal Justice Act 2006, especially as no provision has been made to abolish the prior inherent jurisdiction exercised to defer penalty? The necessity to combine the procedure with the imposition of a fine seems to import an element of extra punishment if the procedure is to be used at all, although as mentioned, this can be circumvented by the imposition of nominal fines in combination with the deferment of sentence. The statutory procedure for deferral of sentence introduces two further restrictions in the guise of a necessary prior

consent of the accused and a fixed period for the maximum period of deferral. Although O'Malley (2000:317) did advocate a maximum period during which a sentence could be deferred at one year, it is difficult to discern why six months was finally decided upon as the maximum time limit. The suspicion arises that the draftsman may have had the restrictions imposed in the District Court Rules in mind when s/he fixed upon the six month period for the maximum time limit for the making of a custodial sentence under Section 100. The new statutory deferred penalty also possibly introduces an unnecessary extra hearing of the sentencing issue by obliging the court to put the case in for further hearing, at least one month prior to the date specified for the imposition of the custodial sentence. In the common law procedure used to date, it is not necessary to re-enter a deferred sentence unless there is a breach, and where such breach is complained of by the prosecution, a warrant may issue to bring the offender back to court to show cause why such original sentences should not be imposed. When the order is reviewed under Section 100(5), if the court is satisfied that the person has complied with the conditions specified in the order, the court shall:-

> "…not impose the sentence that it proposed to impose when making that order and shall discharge the person forthwith (Section 100(11) Criminal Justice Act 2006).

But what is the status of the original order and conviction if the person is "discharged" and has paid a fine in consequence of a conviction? It would appear that a "discharge" in this context is substantively different from the type of discharge contemplated under Section 1(1)(a) of the Probation of Offenders Act 1908. Arguably, the offender is merely discharged from a custodial sentence but not discharged from a conviction particularly when a fine has been paid. The necessity to re-enter the case for the consideration of imposing the deferred penalty at a maximum of five months from the making of the order, suggests the sanction is designed for use almost exclusively in the District Court as the Circuit Criminal Court may not sit in a venue which imposes a deferred sentence in many provincial locations within a six month period of one sitting and the next. Although the designation of "court" is not specified, the limited time span allowed for such procedures suggest it is designed for courts of summary jurisdiction only. If this interpretation is correct does Section 99, which deals with suspended sentence, apply only to courts following trial on indictment? Again the definition of "court" is not limited to such latter

courts, this may be too restrictive an interpretation, but the suspicion remains that the procedure under Section 100 is designed to replace procedures used in the District Court up to now, even though such procedure has not been abolished by the statute.[174]

CONCLUSION

The arrival of Sections 99 and 100 of the Criminal Justice Act 2006 heralds significant changes in the disposal of criminal cases. These changes will in all likelihood emerge in circumstances where the courts abandon the use of the common law jurisdiction to suspend sentences, which it has been argued, survives the introduction of the new statutory power of the courts to suspend sentences. The opportunity to establish the new statutory provisions as the only source of legal authority to suspend sentences was not availed of in the legislative process by abolishing the practices and authority heretofore exercised by the courts. In particular, a difficulty identified from the case of Michael O'Brien – v – Governor of Limerick Prison [1997] 2 I.L.R.M. p.349 in respect of the enforcement of the part suspended sentence may not have been surmounted under Section 99 and appear to endure, in part, under the new arrangement. Accordingly, the power to suspend sentences henceforth may be drawn either from the common law inherent jurisdiction of the courts to do so or under the express provisions of Section 99 and 100 of the Criminal Justice Act 2006.

The inclusion of a prescribed enforcement procedure within the Act itself is a major advance upon the haphazard procedures used to date to ensure compliance with the conditions of a suspended sentence. Besides the uncertainty surrounding the future exercise of discretion by the prosecution (An Garda Siochanna), Prison Governors and the Probation Officers as the case may be (Section 99(13) and (14)), the automatic procedure for activating a sentence upon a further conviction within the period of suspension will facilitate a wider use of the suspended sentence as predicted by the Whitaker Committee (1985). Such wider use of the suspended sentence, however, may result in the displacement of lower grade punishments in sentencing such as fines and even the partial displacement of the probation order, as provision has now been made to include the probation officer in the suspended sentence process itself (Section 99(6)). The Oireachtas

174 The District Court has eschewed the imposition of part suspended sentences up to the present. Section 99 opens up the prospect of the District Court disposing of cases by way of part suspended sentences. This is a double-edged sword. A wider use of the part suspended sentence especially by the Courts which deal with the greater volume of cases is likely to escalate the number of committals to prison consequent upon a greater number of breaches.

has given the courts a wide discretion to impose a suspended sentence under Section 99. Specifically, the Oireachtas has not circumscribed the power of the courts to use the sanction in exceptional cases only, which limitations are a key feature of the suspended sentence in many other jurisdictions. In consequence, the distinct possibility arises that courts which might be encouraged by the new enforcement procedures will use the new sanction much more widely. A further widening in the use of the suspended sentence may occur in respect of the part suspended sentence. The part suspended sentence has been seldom used in the District Court to date and Section 99 does not differentiate between types of courts. If the District Court, the court which deals with the greatest number of criminal cases, embarks upon the use of the part suspended sentence in addition to the wholly suspended sentence, the overall number of committals to prison must be expected to rise and perhaps rise sharply. This view is based upon the expansionary use of the suspended sentence in place of other non-custodial sanctions and the enhanced revocation proceedings brought in under Section 99(9) – (18). While at the initial stage a suspended sentence may avoid custody if it was genuinely contemplated by the sentencing court, if in aggregate the sanction is used more extensively, the level of committals to prison for breach of conditions of the suspended sentence will inevitably rise. At the date of writing, there are no data available in relation to the rate of breaches of suspended sentences in Ireland. However, international experience discloses a reasonably high rate of incarceration for breach of suspended sentences and these high rates of incarceration emerge in jurisdictions where the use of the suspended sentence is restricted in legislation to exceptional cases only, unlike in Ireland under the new Section 99 procedure.

When examined in the round, the new Section 99 discloses features of the emerging control (Kilcommins *et al* 2004) approach to the disposal of criminal cases by the Irish courts. A suspended sentence, which might be regarded as a punishment in its own right is reinforced by the inclusion of conditions which seek to change the behaviour of the offender. In some respects this may be the Trojan horse to replace the traditional probation order. Under threat of a known custodial sentence, the probation officer or treatment agency may coerce the offender to comply with conditions of treatment while armed with the option of returning the offender to court for the imposition of the original sentence. Thus, while the treatment approach is an essential feature of the initial suspended sentence, it is still located under the mantle of coercion rather than persuasion. The other side of the suspended sentence is the distinct possibility that upon breach, even

for a minor infraction of not keeping the peace, especially where no criminal offence has been committed, the offender is liable to be imprisoned (Dignam – v – Groarke and DPP High Court, 27th July 2000 IEHC Bailii). The future operation of the suspended sentence under Section 99, particularly having regard to the level of discretion exercisable by the Garda Siochana, Prison Governors, the Probation Service and by the Courts, raises interesting questions. Will the operation of the section displace the common law jurisdiction, especially having regard to the enhanced enforcement procedures under Section 99? Will courts extend the use of the suspended sentence and part suspended sentence to cases which previously would be disposed of by way of a fine or under the Probation Act? If, as anticipated, there is a wider use made of the section what level of committals will eventually result upon breach and what might this mean for the use and level of imprisonment in the State? Will the greater level of control invested in the Garda Siochana, Prison Governors and Probation Officers have a significantly positive effect upon the level of persistent offending among certain groups of offenders who might be targeted for intervention under the section and if not will the section be used to target for incarceration a discrete group of offenders specifically for custodial selection?

The introduction of the suspended sentence under Section 99 presents a challenge to the various agencies operating within the criminal justice system in Ireland, not least the sentencing courts themselves. The advantages presented in the legislation, particularly the issue of enhanced enforceability, may encourage sentencers to use the sanction more widely. However, if the scope of the sanction is not delineated by the superior courts to serious cases only, it is likely the Irish sentencing courts look set to continue the use of the sanction as an alternative to already established non-custodial sanctions.

CONCLUSION

This study was undertaken to advance the state of knowledge on the role of the community service order and the suspended sentence in Irish sentencing. Both sanctions are presented in their formal sense as alternatives to the custodial sentence. This unique relationship with the custodial sentence places the two sanctions in a place apart from all other non-custodial sentences such as fines and probation. In policy terms, both sanctions should only be used where a real custodial sentence is actually contemplated before the court might then decide to apply either sanction as an alternative to such custodial sentence. And yet in practice the two sanctions may take on quite different personae in the crucible of the sentencing court.

O'Malley (2006), Osborough (1981) and Walsh (2002) have written extensively on the law and practice of sentencing in Ireland while O'Mahony (1997) and others have identified a number of issues from a sociological perspective relating to crime and prisoners. However, little if anything is known about sentencing from the judge's perspective and in particular in relation to the imposition of community service and the suspended sentence.

Prior to the study it was not possible to state what was the role of the community service order or the suspended sentence in Irish sentencing except by reference only to statutory provisions or case law. The attempt to go "behind the veil" by interviewing the primary actors, namely the sentencers themselves, in an non-courtroom setting, allowed for the emergence of perspectives on the sanctions which may not otherwise have been revealed. Moreover, at certain points in the analysis a clear disconnection may be observed between the stated purpose of the individual sanction and the actual use made of it by the individual sentencers. Can this be explained by idiosyncratic practices by some of the judges or are there more fundamental factors at play to bring about and sustain such divergence?

An examination of the role of the community service order and the suspended sentence in Irish sentencing practice necessitated a wide array of methodologies both qualitative and quantitative to allow for the emergence of understandings of the sanctions. The uses of such sanctions may even be observed to change over time. This presents specific difficulties of interpretation for the researcher where either sanction under discussion may

acquire certain dynamic characteristics. Consequently it may be erroneous to examine both sanctions on the basis that they may have fixed and immutable meanings.

Access to judicial understanding of these sanctions as instruments in sentencing was critical to this study. Without this perspective the study could not have been informed of the judges' cognitions and expectations which are repositories of significant information on the sanctions. The study proceeded with an "external" examination of the sanctions by reference to their historical emergence, their development over time and a search for the rationales of each sanction. By allowing for the extra dimension of the judges' perceptions of the sanctions, an "internal" examination of the community service order and suspended sentence was possible. This internal perspective has been triangulated with the traditional or external perspective which allows a much fuller understanding of the workings of both sanctions. Specifically, issues such as the relationship between the custodial sentence and either sanction has been explored to discern the extent to which the judges subscribe to the necessary pre-custodial requirement. Other issues such as the process of selection of offenders by judges for community service or a suspended sentence have been explored. While these issues have been subject to enquiry previously (Osborough1981), Walsh & Sexton (1999)) they are re-examined in light of the quantitative and qualitative data generated in the empirical work of this study.

Community service appears to be relatively underutilised as a sanction in place of custodial sentences for minor offences while suspended sentences may be applied much more liberally in respect of offences where a custodial sentence might never be intended. These features were identified early in the enquiry as crosscutting issues (Kreuger 1998) and particular attention was given to them, especially as they might assist our understanding as to why some offenders were excluded from both sanctions. Additionally, in this approach, some structural issues such as reliance by judges upon external agencies such as the Probation Service and the Gardai could be identified as significant impediments to the use of either sanction.

In particular, the judges were critical of what they perceived to be the overuse of discretionary practices by Probation Officers in the supervision of offenders generally as well as a reluctance of the Gardai or the Prosecution to seek activation for obvious breaches of suspended sentences. As a consequence of this, it was possible to identify a

desire by the judges to retain ownership of the sanctions to a significant degree instead of handing over the function of supervision to executive agencies whose task it is to monitor and breach where necessary.

Thus in the study it was possible to revisit certain features in the use or non-use of the community service order and the suspended sentence but to allow a somewhat different understanding of the operation of the sanctions to emerge at the same time.

COMMUNITY SERVICE ORDERS

Community service was introduced in 1983 in Ireland for the most pragmatic of reasons; to ease the chronic problem of prison overcrowding. Although the sanction has been invested with a number of purposes such as rehabilitation of the offender, reparation to society and reintegration, it presents primarily within Irish sentencing as a punishment. Specifically, the sanction is formally presented as a sanction which should only be made in lieu of a custodial sentence. The proximal relationship between the custodial sentence and the community service order requires that community service is imposed only where judges would normally apply a custodial sentence. Therefore in Irish sentencing, community service should be utilised for serious and repeat offenders instead of minor or young offenders and first time offenders. But does it really work like this? Some of the information gathered in this study may challenge this position. In particular the great enthusiasm among the judges to have community service available as a stand alone sanction without the pre-custodial requirement could be interpreted as resistance on their part to recognise an equivalence between a custodial sentence and community service. As noted, they said they would use community service more extensively if it was decoupled from the pre-custodial requirement. Moreover, the relative underutilisation of the sanction at present with only a total of 1158 community service orders made in the year 2006 (Petrus VFM 2009:46) suggests that sentencers deploy community service in relatively few cases especially for minor offences which otherwise result in an actual custodial sentence. Further evidence of this apparent reluctance by a number of sentencers to use community service at all is suggested in the distribution of its use across courts: we have seen in chapter 3 that some courts use the sanction relatively often but a significant number of courts never appear to use the sanction at all. It is difficult to draw a definitive conclusion

on this issue. Strictly speaking one is limited to a commentary that some judges utilise the sanction and others do not. However, the responses from the judges in the focus groups and interviews did point to a desire on their part to allow the use of community service for less serious offences which are disposed of at present by way of fine, probation orders and discharges. To some extent this suggests a residual reluctance on their part to fully embrace the community service order as a real alternative to the custodial sentence. The desire on the part of some judges to allow community service orders to be made independently of any pre-custodial requirement may also be criticised on the basis that a more punitive penalty might replace a less punitive penalty such as payment of a fine or attendance at probation. As noted previously, the judges also referred to perceived structural problems in the operation of community service schemes which dampened their enthusiasm to utilise the sanction more often. In particular, these touched upon a concern that community service schemes may not be organised to optimise the community service potential of the sanction. Instead of harnessing the individual specifically to a task, the schemes are arranged around sites which yield the least satisfactory outcomes for the community and the offender. This in turn may lead to higher levels of dissatisfaction with the work and higher levels of breach. Moreover quite a few judges were critical of the discretionary practices of the Probation Service in the operation of the community service schemes specifically delay in bringing a non- compliant offender back to court for breach of a court order.

Some courts particularly at the higher jurisdictional levels have adopted the approach of re-entry of the case for mention to specifically deal with the issue of non-compliance. This suggests that these courts retain ownership or control of the sanction until the offender is finally discharged by completion of the community service order. Courts of summary jurisdiction could not realistically adopt this approach due to the volume of cases which need to be dealt with in these courts. However, the infrequent use of community service in some of the summary courts may be attributed to the courts inability to either monitor the offender on community service directly or indirectly through the agency of the Probation Service.

Perhaps another way of viewing these issues is to focus upon the sanction of imprisonment itself. The custodial sentence, whatever may be claimed about its purpose, is invested with certainty. The offender is committed to prison and subject to the right of

remission and early release is committed to remain there for a fixed period. Community service is located in Irish sentencing law as a direct substitute for this "certainty". The judges' responses do point to some reluctance to depart from this "certainty". Is it possible that a programme of reassurance might help persuade some sentencers to utilise the sanction more often or is there a more fundamental objection by some judges to equate the custodial sentence with the alternative of community service as a punishment but punishment in the community?

While only one judge who was interviewed declared s/he would not use community service as such, quite a few did vent criticism of the operation of the schemes which could be interpreted as a brake upon their enthusiasm to use the sanction as an alternative to a real custodial sentence.

Besides the primary use of community service as an alternative to the custodial sentence, quite a few of the judges adverted to the rehabilitative aspects of the sanction with particular reference to unemployed offenders who may lack structure in their lives. Although the judges believe that community service would in certain circumstances provide an opportunity for rehabilitation, it is unlikely that a short attendance at a community service scheme would be sufficient to transform the behaviour of an offender from life – learned experience and probable social deprivation. It is argued that judges in these circumstances are more likely to transpose their own learned experiences more in hope than in any real expectation of the outcome of rehabilitation. Some indeed volunteered that community service might be appropriate and that they would use it as such for that express purpose without too much concern for the pre-custodial requirement under Section 2. The various filters which Irish sentencers apply to select suitable offenders for community service may give rise to a bifurcatory approach in the disposal of cases. The selection process implies categories of inclusion and exclusion. An offender may be on the cusp of change and is given a chance not to enter custody but the process of filtration may also result in a denial of an opportunity to the offender on the basis that the judges simply deem the offender is bound for prison and nowhere else. The judges are invested with very wide discretionary powers to exercise the choice to impose a custodial sentence or to substitute it with a community based sanction. While crimes of violence are generally regarded as excluded, there is no certainty in the general scheme of things that an offender will receive community service for an offence such as a 3rd conviction for drunken driving

instead of a custodial sentence. A distinct danger may occur where offenders are uplifted to the penalty of community service instead of receiving a fine or probation because the breach of a community service order is much more likely to result in an actual custodial sentence where originally the offender may not have been considered at all for such a sanction. Thus it is important that judges maintain fidelity to the prescriptive requirements of Section 2 of the 1983 Act, otherwise the "soft" or "shallow end offender" may gravitate to a higher penalty through a process of net-widening in the application of the sanction. While some departure from Section 2 was detected in the survey, it is probably not as wide as that assumed by the Comptroller and Auditor General at 30% (Comptroller and Auditor General, 2004).

A particular feature which is absent from the Irish community service schemes is the desirable linkage to the voluntary movement. Originally in England and Wales the voluntary movement was considered an essential building block in the rehabilitative ideal. Although Irish community service schemes tend to be located around community projects such as parks, social centres and sports clubs, the real connection with volunteers who would work alongside the offender is not provided. Thus the positive influence of the non-judgmental volunteer as an exemplar and mentor is largely absent in the Irish schemes.

Besides the factors identified which may inhibit the greater use of community service, a few respondents pointed to the positive feature of the sanction as an alternative to custody. But they stressed that the offender is unlikely to fully realise the appropriateness of the sentence or internalise it as such, unless it is explained clearly that the sanction is made as a direct substitute for a real custodial sentence. Moreover a greater compliance may be expected if it is explained to the offender in advance what may follow if the community service order is not completed. As noted previously, compliance rates improve when the offender is enabled to internalise the sanction as fair in itself and where the parameters of transgression are clearly delineated in advance.

Closely allied to this issue is the necessary consent of the offender. The scheme which the Irish authorities imported from England and Wales continued this essential ingredient as a precondition to the working of the community service order. Although it was introduced essentially to avoid the State's obligations to avoid the use of enforced labour, when the offender gives his prior consent the offender may be seen to engage with the court in a

mutual resolution of the penalty. However as noted, consent must endure for the entire community service order, otherwise the offender will be deemed to have withdrawn the consent by non completion or other default.

When examined in light of the original policy that community service should be a decarcerative instrument and should have the effect of reducing the prison population, it is probable that the sanction has not fully reached its potential in that regard. Various issues have been identified in this study whether real or perceived, which inhibit a more fulsome judicial deployment of the sanction. If the strong desire of judges to extend the use of community service to non-custodial type penalties is realised by statutory amendment, it will more likely result in the defeat of that original policy. Instead of expanding the current use of the sanction under the prescriptive requirements of Section 2 it is probable, should the sanction be decoupled, that greater pressure would result on the prison system due to a failure rate of about 20% of all community service orders. These offenders would inevitably gravitate upon breach towards the custodial system. The dangers of expanding the scope of community service have been highlighted in the discussion on the Children Act 2001 in Chapter 4.

THE SUSPENDED SENTENCE

The suspended sentence as an alternative to the custodial sentence has been examined from a number of different perspectives in this study. The sanction has somewhat obscure origins in Irish sentencing practice but unlike other common law jurisdictions where the sanction was introduced in a statutory framework, the Irish sanction evolved solely from within judicial practice. Thus the search for the purpose of the suspended sentence in Ireland leads one inexorably to an examination of the judges' practices and perceptions to reveal the rationale behind the use of the sanction. O'Malley (2000:292) has opined that it is difficult to identify any clear principles in which the court might make a suspended sentence although he is at one with Osborough (1981) that the suspended sentence should only be made where a real custodial sentence is intended. Thus the avoidance of the use of a custodial sentence emerges as a strong contender for the purpose of the sanction. However, the judges in the interviews, while acknowledging that the avoidance of custody

is a feature of the sanction, placed much stronger emphasis upon the special deterrent effect of the suspended sentence. If the sanction is a judge made disposition, as it is in Ireland, the views of the sentencers on this point are critical to discern the real purpose of the sanction. As noted, even in jurisdictions such as England and Wales and Victoria where the suspended sentence is specifically designed as an alternative to the custodial sentence, the judges invariably gravitate towards the use of the sanction as a special deterrent only. Judicial departure from a statutory policy to utilise the suspended sentence only as an alternative to the custodial sentence has a two-fold negative effect. Firstly, a significant number of offenders are uplifted into a category of sanction which is potentially more punitive and secondly the courts tend to apply a greater penalty than would be the case because the sentence is to be suspended.

Although O'Malley has categorised the suspended sentence in Ireland as a dual punishment which encompasses both the custodial sentence albeit unserved and the risk of having to endure the period of suspension, it could be argued that observing the laws and keeping the peace is an obligation placed upon all citizens whether criminal or law-abiding. This calls into question whether the suspended sentence is punishment at all or punishment enough. Perhaps it is more appropriate to regard the suspended sentence as a punishment which is essentially residual and contingent but which may never and usually is not invoked despite manifest breaches. In this interpretation of the sanction, the deterrent function emerges as the primary contender for the use of the sanction and the judges in the interviews confirm this view. Thus the sanction at a formal level presents as a custodial sentence which is avoided by its conditional suspension, but deterrence is the *sub rosa* purpose of the sanction. It is unlikely that judges would ever invest the sanction with a purpose other than that for which they believe it should be used. The experience in other jurisdictions confirms this tendency even where the use of the sanction is much more prescriptive.

A certain ambiguity persists in the purpose for which the suspended sentence is used in Ireland. This has allowed for the deployment of the sanction for a wide array of offences across of all of the criminal jurisdictions which deal with the most minor to the most serious of offences. The suspended sentence, which remains hidden to a large extent in official statistics under the category of custodial sentences, was revealed in this study to be used extensively in all criminal jurisdictions. Could it be that most or all of these suspended

sentences would have been custodial sentences if the option to suspend a sentence was not available to Irish judges? Or would a significant number of these cases have been disposed by way of fines, probation or conditional discharges in the absence of such a penalty? The study reveals that a significant proportion of suspended sentences in Ireland are made essentially to control the future behaviour of the offender where the court might retain some degree of residual ownership. Instead of imposing a punishment for past misbehaviour, the suspended sentence allows the court to control the future behaviour of the offender by placing an obligation on the offender to comply with conditions of the suspension. In this way the extraction of retribution is contractually held in abeyance in exchange for a promise of good behaviour. The role of rehabilitation in the suspended sentence is integrally established in this perspective where the change in behaviour of the offender is the objective to be achieved.

Conditions which are attached to a suspended sentence are the defining characteristic of the sanction. The sentence is not usually suspended *in toto*. It was customary in the past, and since the arrival of Section 99 of the Criminal Justice Act 2006 it is obligatory, to specify the conditions of compliance within a bond. The bond may be secured by monetary sureties but this is not absolutely necessary. But the bond should specifically state the conditions of compliance and the period for which the sentence is to be suspended. The conditions attached to the suspended sentence might provide specifically for the offender to attend a drug or sex offenders programme. But the primary conditions of a suspended sentence are that the offender keeps the peace and is to be of good behaviour. These latter conditions may not be tied into any therapeutic intervention at all and thus may be viewed not as rehabilitative in themselves but as limitations which are placed upon the offender to control his/her lifestyle.

The question whether the suspended sentence has proven to be a successful rehabilitative sanction has not been addressed in this study but the literature from other jurisdictions on the rehabilitative effect of the suspended sentence is not encouraging. Nonetheless, Irish judges were specific in their reference to this rehabilitative purpose in their extensive use of the sanction.

The judges were critical of the various agencies charged with the execution of the suspended sentence particularly the role of the D.P.P and the Gardai in failing to make

applications to revoke the suspended sentence where grounds clearly exist for revocation. Notwithstanding this the judges continue to use the sanction extensively.

Perhaps the unbridled enthusiasm for the suspended sentence by Irish judges may be due to the hope which judges bring to bear when making the sentence rather than any real expectation that the conditions of the sentence will in the end be complied with. This view is reinforced by the observation that Irish judges have tended not to invoke a suspended sentence upon breach except for offences of almost comparable gravity. Thus, a fair degree of leniency is extended both at the original sentencing and also at the breach hearings to facilitate the continued suspension of the sanction in hope that ultimately the "last chance" will not need to be extended further. Despite their criticism that outside agencies might exercise too much discretion in not re-entering cases, it is remarkable that when cases are re-entered a high degree of discretion is also exercised by the judges themselves by not revoking the sentences upon breach.

When considering who should be given a suspended sentence, the judges equally apply a process of filters to exclude certain categories of serious offenders from the sanction. Generally, the judges consider cases which were deserving of a custodial sentence suitable for suspension where some aspect of the case might tip the balance in favour of suspension. Frequent reference was made to the "last chance" to be extended to the accused especially where a plea of guilty was offered. Thus, managerial considerations around the early disposal of cases were identified as important factors in favour of suspension. However not all of the judges subscribed to this extensive discounting approach.

But certain offences were usually considered beyond the pale of suspension. In particular, serious drug dealing offences, serious sexual offences, gun related offences and certain categories of crime which from time to time the judges believed should require a strict response to bring certain trends in criminal behaviour to a quick halt such as "epidemics" of joy-riding in certain localities. On the other hand, judges were not inflexible to the type of offender who might receive a suspended sentence notwithstanding the seriousness of the offence. Examples of these included a student with no previous convictions and is charged with a Section 15(a) offence (Possession of Drugs for Sale or Supply value in

excess of €13,000) or a case where the offender by virtue of his/her physical or mental characteristics would be much more vulnerable while in custody.

A certain contractual exchange was also identified in the making of the suspended sentence. In particular, the judges believed that they had the discretion to suspend the sentence for a longer period than the actual custodial sentence as a price to be paid by the offender in not having to serve any time in prison and to ensure compliance as a special deterrent over a longer period of time. In this regard the judges were not in sympathy with the general comments of Keane C.J. in *Hogan's* case (supra) in the Court of Criminal Appeal. The judges specifically referred to the necessity to test the *bona fides* of the offender over a reasonable period of time in excess of the custodial period. This feature of the sentence reinforces the view that the sentence is in essence a deterrent sentence. Some of the judges referred to this as part of the price to be paid for suspension and it might even include community service in some cases within the same sentence as a condition of suspension, notwithstanding the irregular combination of community service with any other sanction.

The part-suspended sentence has recently emerged in courts which exercise indictable jurisdiction as the sentence of choice in place of the reviewable sentence which had been abandoned as a sentencing practice following the *Finn* case. Unlike the wholly suspended sentence, the part-suspended sentence requires the offender to enter into custody for an initial period which is subject to remission of sentence. The Circuit Criminal Court utilises the part-suspended sentence with great frequency as does the Central Criminal Court for non-mandatory sentences. Previously, when the reviewable sentence was used, the courts sought to stabilise an offender, particularly offenders with drug related problems, before considering suspension of the sentence which usually followed. The part-suspended sentence which has replaced the reviewable sentence subscribes to the same approach, except that the entire sentence is pronounced at the one sitting of the court and thereafter the supervision of the offender is a matter for the Probation Service or the Prison Service or the Prosecution as the case may be. The part-suspended sentence differs from the wholly suspended sentence in that a real punishment of imprisonment is imposed and served by the offender. Thereafter upon suspension, the punitive element of the sanction is contingent and residual as it is with the wholly suspended sentence. The new regime under Section 99 of the Criminal Justice Act 2006 allows the Prison Governor to seek a

revocation of the sentence which is suspended if the prisoner is not compliant while in custody. This may allow the prison authorities to oblige offenders to participate in therapeutic programmes, such as sex offender programmes, while serving the initial period of a part-suspended sentence. In time this may emerge as a significant instrument in the efficacy of such programmes.

The revocation of the part-suspended sentence may present certain difficulties in the calculation of the period of custody to be served if the offender is found to be in breach by virtue of the separate calculation of remission of sentences. The anomalies identified in this study might be rectified in statutory provisions for the avoidance of such doubt.

A certain change of emphasis was noted in the surveys where judges expressed greater confidence in the use of the suspended sentence following the implementation of Section 99 of the Criminal Justice Act 2006. The judges claimed they have now been given ownership of the function of re-entry of cases where the offender re-offends and is convicted. As a result their confidence in the efficacy of the machinery of the sanction has increased significantly. However, the efficiency of the machinery of the sanction should not be equated with the efficacy of the sanction itself. Generally speaking, the judges had an open mind on the efficacy of the sanction in relation to recidivism. When challenged on this by the writer, the usual response was to individualise the sentence by reference to a single offender. If the offender breaches, they claimed s/he has only her/himself to blame. But any perception of a wider efficacy of the sanction itself was not forthcoming. Although the matter was not specifically addressed in this study having regard to the boundaries originally set, it is unlikely that the suspended sentence in Ireland is any more efficacious in the reduction of recidividism than the literature in other jurisdictions suggests.

It will be recalled that both the public and offenders alike in other jurisdictions when surveyed have placed the suspended sentence in the category of penalty lower than that of a small fine. However the Irish judges locate the suspended sentence up close to the custodial sentence when they utilise the sanction, notwithstanding that the sanction is more generally used as a deterrent sentence.

In Conclusion

The suspended sentence and the community service order are presented in this study as direct alternatives to the custodial sentence. The relative underutilisation of the community service order suggests that the courts generally look upon the actual custodial sentence as a separate sentence which must be served if the offence and the circumstances of the offender ultimately warrant it. Community service orders are made with much less frequency than custodial sentences, particularly in respect of minor offences. This suggests that a significant number of sentencers do not generally equate community service with a real custodial sentence and hence are reluctant to use it for that purpose. Of those judges who do use the community service order, the study discloses the presence of a subset of sentencers within that group, who would occasionally utilise the sanction without strict compliance with the pre-custodial requirement of Sec.2

Paradoxically the high frequency with which the suspended sentence is used on the other hand suggests that the suspended sentence is not used as often as is claimed as an alternative to a real custodial sentence but rather as an approximation to a conditional discharge at a much lower level of penalty.

In the case of the community service order, a punishment on time is extracted whereas under a suspended sentence a commitment towards good behaviour is conditionally given by the offender. Provided the offender complies with the conditions of the bond the integrity of the sentence remains intact. However, if a breach occurs and the offender is not brought back to the court the deterrent value of the sanction which has been identified here as the primary purpose of the sanction is undone. This raises again what Osborough (1981) has referred to as an awkward question. If both offenders and judges do not believe that breaches will be brought back for consideration of revocation, can the suspended sentence have any other purpose other than to symbolise the passing of a custodial sentence which is never under any circumstances to be served or is the sentence merely a marker for a subsequent court to take into account when sentencing for a subsequent offence?

The operation of Section 99 of the Criminal Justice Act 2006 may provide the point of departure from this dystopian view of the operation of the suspended sentence to date.

There remains a significant deficit of information on the rehabilitative effect, if any, of both community service and the suspended sentence in Ireland. Further research needs to be undertaken in this area to test the assumption that rehabilitation is the ideal to be served and that it works.

It has been possible however to identify from the research a number of features of the sanctions which if addressed may assist in the enhancement and efficacy of each sanction. These include the elevation of consent by the offender to be bound by either sanction, where first the offender is given a clear understanding of what the sanction means and what is required to ensure compliance, and secondly the internalisation of the sanction as fair by the offender. Thus better outcomes for both sanctions may be expected if the court itself fully explains and engages with the offender when the sentence is given. It is also recommended that the part-suspended sentence could be more usefully deployed in the case of drug and sex offenders if conditions as to treatment were imposed for the custodial part of the sentence as a condition to the suspension of the latter part of the sentence. In this way the therapeutic input could be commenced at an early stage in the rehabilitation process.

The interdependent nature of the administration of sentences such as community service orders and the suspended sentence requires inputs from a number of agencies. The judges are not fully confident that a suspended sentence or a community service order will be re-entered by the relevant agency such as the Prosecution or the Probation Service. Ownership of the sanction is seen to pass from the court to the enforcement agency but the courts have evinced a reluctance to relinquish the control of the sanction until they can be assured that the sentences will be appropriately monitored. Likewise Halton (2006) has identified distrust by probation officers of the judges in her research. Perhaps a frank exchange between the various actors in the sentencing process on these issues would allow a more optimal use of these sanctions.

Such exchanges might facilitate a greater understanding of the objectives of each of the actors who are involved in the sentencing process and the underlying procedures which are used by the different actors to achieve their aims. It is argued that if the actors and particularly the judges perceive the working of the sanctions to be a broken process and consequently less effective, they will be disinclined to use the sanctions as often as they might otherwise be minded to do.

But on these topics and for the present I put down my pen.

APPENDIX A

The questions below were used in both the focus groups and the semi-structured interviews to ensure consistency of approach. By utilising the same format, the analysis of responses by the Judges was facilitated. This allowed clear patterns of responses to emerge which confirmed the appropriateness of the methodologies which were chosen.

The Questions

1. Thinking back over the CSOs that you have imposed, what is it that you intended to achieve when you made such Orders? [uncued opener].

2. What do you consider is the purpose of the CSO when you use it as a sentence?

2. [follow up question]. Thinking back, in what circumstances would you consider a case suitable for a Community Service Order? Conversely, in what circumstances would you consider such a disposal as unsuitable?

3. In the overall range of sentences, where do you see a place for the CSO?

3. [follow up question]. What relationship, if any, do you see between the CSO and other sanctions?

3. [follow up question]. What relationship, if any, do you see between the CSO and a custodial sentence?

4. All things considered, what do you feel is the most important feature of the CSO?

5. When you put somebody on a CSO, does the sanction achieve its purpose?

5. [follow up question]. How would you know?

6. Once you make a CSO do you allow the Probation Service to deal with the matter or do you review the performance of the CSO?

7. If a case is brought back to you for a breach of a CSO, generally how would you deal with it?

7. [follow up question]. Do you:-

(a) Breach and impose the sentence in full?
(b) Give the offender another chance and supervise the remainder of the order to be served?
(c) Ignore the breach altogether?
(d) Deal with the offender in some other manner?

8. What do you think of the CSO generally?

The Suspended Sentence

1. Thinking back over the suspended sentences that you have imposed, what is it you intended to achieve when you made such Orders? [uncued opener].

2. What do you consider is the purpose of the suspended sentence when you use it as a sanction?

2. [follow up question]. Thinking back, in what circumstances would you generally consider a case suitable for a suspended sentence? Conversely, in what circumstances would you consider such a disposal as unsuitable?

3. In the overall range of sentences, including imprisonment, fines, probation and community service, where would you rank the suspended sentence as a sanction?

4. When imposing a suspended sentence, do you suspend the sentence for a longer period than the period of custody? If so, why do you do that and for how long do you usually extend the period?

5. The part suspended sentence appears to be somewhat different to the wholly suspended sentence. Thinking back over the cases where you might have imposed a part suspended sentence, what did you intend to achieve by structuring the sentence in that way? [uncued open question].

5(a) Why would you impose a part suspended sentence as opposed to imposing a full term of custody?

5(b) Does an early plea of guilty have any role in the decision to suspend a sentence in part? – Why?

6. All things considered, what do you feel is the most important feature of the suspended sentence?

6. [follow up question]. What importance do you attach to the conditions of a suspended sentence?

7. When you put somebody on a suspended sentence, does or should the Court have any ongoing involvement in the case other than the consideration of a breach?

8. When you put somebody on a suspended sentence, does the sanction achieve its purpose? - How would you know?

9. If a case is brought back to you for breach of a suspended sentence, generally how would you deal with it?

Do you:-

(a) Breach and impose the sentence in full?
(b) Give the offender another chance and supervise the remainder of the suspended period to be served?
(c) Ignore the breach altogether?
(d) Deal with the offender in some other manner?

10. Have you any other observations to make on the suspended sentence?

11. We spoke about the Community Service Order as an alternative to custody. We also spoke about the suspended sentence of imprisonment. When would you use one and not the other?

APPENDIX B

THE FOCUS GROUPS

Focus Group

A1 (DISTRICT COURT JUDGES) DC.....16 July, 2007 and 31 July 2007

J1, J2, J3, J4, J5, J6, J7, J8 (+3)*

A4 (DISTRICT COURT JUDGES) DC ..... 22 November, 2007.
J1, J2, J3, J4, J5.

A7 (CIRCUIT COURT JUDGES) CC .....15 November 2007
J1, J2, J3.

THE INTERVIEWS

A5J1 (CIRCUIT COURT JUDGE) CC .....22 October, 2007.

A8J1 (SUPREME COURT JUDGE) SC .....5 November, 2007

A2J1 (DISTRICT COURT JUDGE) DC .....19 September, 2007

A6J1 (DISTRICT COURT JUDGE) DC .....11 December, 2007

A3J1 (CIRCUIT COURT JUDGE) CC .....16 October, 2007.

A9J1 (HIGH COURT – CENTRAL CRIMINAL
COURT JUDGE) HC ..... 27 November, 2007.

*NOTE – This group was twice convened due to pressure of time. Community service was covered in the first session and the suspended sentence in the second. When the second session was reconvened, the Judges comprising the group changed by three Judges i.e. three new Judges participated and three Judges from the earlier session did not participate.

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